

REFERENCE GUIDE TO  
POST-GOVERNMENT SERVICE  
EMPLOYMENT ACTIVITIES OF  
DEPARTMENT OF THE NAVY  
PERSONNEL

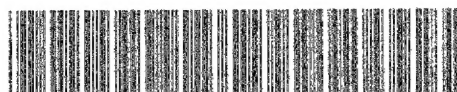
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## THE JUDGE ADVOCATE GENERAL OF THE NAVY

### Preface

The Reference Guide to Post-Government Service Employment Activities of Department of the Navy Personnel is published to assist you in your transition from service in the Department of the Navy (DON). It has been completely updated.

As DON personnel, we know that adequate preparation before setting off on a mission is often the key to its successful accomplishment. I encourage you to view post-Government service employment as any other mission and to prepare accordingly since the laws and regulations that govern this area are complex and have serious consequences for the unwary.

After reading this pamphlet, you may discover that, while your voyage will take you to specific locations for which a detailed chart is required, we have provided you with only a world map that does not contain sufficient detail for your needs. We do not intend for this pamphlet to serve as a substitute for legal advice. You should refer specific questions to your local ethics counselor, the Office of the General Counsel (Assistant General Counsel (Ethics)), the Office of the Judge Advocate General (Code 13), or the Judge Advocate Division (JAR), Headquarters U.S. Marine Corps, as appropriate. The advisory opinions given by these ethics officials will provide you with helpful guidance as you make your transition to your new career.

I wish you smooth sailing in your future endeavors.



H. E. GRANT  
Rear Admiral, JAGC, U.S. Navy  
Judge Advocate General

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## I. INTRODUCTION

A. Various laws restrict the employment activities of individuals who leave Government service. While most of these statutes apply equally to both civilian and military personnel, some apply to military personnel only and others apply to personnel only above certain pay grades. These restrictions are based upon the need to:

1. prevent activity which conflicts with the interests of the United States;
2. promote economy in the Federal Government;
3. expand employment opportunities within the Federal system; and
4. preserve the public's confidence in Government integrity.

B. You are responsible for determining which post-Government service employment activities you may legally pursue. Ethics counselors, however, will advise and assist you. Ethics counselors are the staff judge advocates of general court-martial convening authorities (e.g., flag and general officers in command), commanding officers of Naval Legal Service Offices and Trial Service Offices, counsel at systems and other major commands, and other designated counsel and judge advocates. Consult your local counsel, judge advocate, Naval Legal Service Office or Trial Service Office to determine who is the ethics counselor responsible for providing advice to you.

C. While ethics counselors will advise personnel on the propriety of proposed activities, four limitations must be recognized.

1. In many cases, ethics counselors cannot render authoritative opinions since the interpretation of many of these laws is a function of other Government agencies. For example, construing criminal statutes is a function of the Attorney General and the courts. Similarly, authoritative interpretation of the laws governing compensation of military personnel is a matter within the cognizance of the Comptroller General of the United States. Consequently, ethics counselor's opinions in these areas, including the opinions expressed in this pamphlet, are advisory only.

2. Questions submitted to ethics counselors should, insofar as possible, involve concrete situations. The facts of each case should be disclosed fully since legal analysis is usually totally dependent on the facts presented. Different facts produce different outcomes.

3. Furthermore, the field of law which this pamphlet discusses changes frequently. While we have endeavored to make this pamphlet as timely as possible, always ask your ethics counselor for advice on the existence and meaning of new legislation or regulations.

4. Ethics counselors are attorneys for the Government. While they will endeavor to answer your questions and provide opinions on the applicability of the law to factual situations, they are not your lawyer. Statements made or documents provided to ethics counselors are not confidential or privileged. You do not enter into an attorney-client relationship when you consult an ethics counselor. If you do not wish to disclose certain matters to the Government, you may wish to retain a private attorney.

D. Some editorial comments are warranted.

1. Unless indicated otherwise, the term "employee" as used in this pamphlet includes both military and civilian personnel.

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2. This guidance corresponds with DOD 5500.7-R of August 30, 1993, Joint Ethics Regulation.

3. All references to "U.S.C." and "U.S.C.A." are to the United States Code and United States Code Annotated, respectively.

4. Use of the terms "he," "his," "him," or "himself" include she, hers, her, or herself.



## II. SEARCHING FOR A JOB

**A. Introductory comments.** All Federal employees must comply with both statutory and regulatory limitations governing the search for outside employment. In addition to some general restrictions, there are also specific restrictions that apply to employees who have performed or are continuing to perform procurement functions. Both the general restrictions, and those regulating procurement personnel only, are discussed in more detail in the following paragraphs.

### **B. Prohibition on participating in Government matters involving a prospective employer**

1. **Criminal prohibition.** Before an employee begins "negotiating" or "seeking employment" with a private concern, the employee is required to disqualify himself from taking any governmental action which could impact the prospective employer. A criminal statute, 18 U.S.C. § 208, prohibits Federal employees from participating "personally and substantially" in any particular Government matter in which any private entity, with which an employee is negotiating or has an arrangement for future employment, has a financial interest. The maximum penalty for a violation of this statute is a fine of \$50,000 and imprisonment for 5 years.<sup>1</sup>

a. These restrictions apply to those matters in which an employee participates "personally and substantially" through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise. The circumstances of participation might have been a judicial or administrative proceeding, an application, request for a ruling, or other determination, contract, claim, controversy, charge, accusation, arrest, or any other "particular matter." To participate "personally" means to do so directly and includes the participation of a subordinate when actually directed by a senior in the matter. "Substantially" means that an employee's involvement was of significance to the matter.

(1) **Example.** If while performing quality assurance inspections of products produced by Company X, an employee violates the law when he negotiates for prospective employment with Company X. This would be true even if the employee recommended the Government not accept any products from Company X during the period the employee was engaged in employment negotiations with it.

b. An employee can avoid violating this statute by disqualifying himself from participating in any Government matters in which the prospective employer has a financial interest. Disqualification is accomplished by not participating in the particular matter.<sup>2</sup> DOD 5500.7-R, Joint Ethics Regulation, section 2-204, requires that disqualification be accomplished, in every instance, by written notice to the supervisor. This will ensure that DON responsibilities do not go unfulfilled. We also recommend that reporting seniors issue a confirming memorandum, with copies to your immediate subordinates and ethics counselor, setting forth the procedures to shield the employee from the conflicting interests. A sample document is at the end of this section.

c. Federal courts have held that the term "negotiating" is to be broadly construed.<sup>3</sup> The implementing regulation defines "negotiation" as:

a discussion or communication with another person, or such person's agent or intermediary, mutually conducted with a view toward reaching an agreement regarding possible employment with that person. The term is not limited to discussions of specific terms and conditions of employment in a specific position.<sup>4</sup>

d. For a violation of 18 U.S.C. § 208 to occur, a formal offer of employment need not be made by either the employee or prospective employer.<sup>5</sup> Submitting a job application or engaging in a job interview may constitute prohibited conduct.<sup>6</sup> Therefore, an employee should disqualify himself from official action whenever there is any contact with any company concerning the possibility of a future job unless the sole contact is initiated by the company and the employee immediately rejects it. A situation often arises where contact is

made, employment negotiations ensue, and the employee later decides not to accept the job. In such a case, the employee should disqualify himself initially. After rejecting the job, the employee should file another written notice with his reporting senior, providing copies to his immediate subordinates and ethics counselor, stating that he is no longer disqualified from acting in an official capacity with respect to the private entity concerned since the job has been rejected.

2. Regulatory prohibitions. In addition to the criminal prohibitions, all DON personnel, whether military or civilian, are subject to the standards of conduct regulation.<sup>7</sup> The prohibitions on searching for employment in the standards of conduct are broader than those in 18 U.S.C. § 208, the criminal conflicts of interest statute. The standards of conduct require that before an employee begins seeking employment the employee must disqualify himself from taking any governmental action involving a prospective employer.<sup>8</sup>

a. An employee has begun seeking employment<sup>9</sup> if he has, directly or indirectly, done any of the following:

(1) If the employee has engaged in "negotiations." (This term is defined above in the discussion of § 208.) This provision encompasses all of the prohibitions in § 208.

(2) If the employee has made an unsolicited communication to any person, or such person's agent or intermediary, regarding possible employment with that person. Submission of a resume or other proposal to an entity or person who is directly affected by the performance or nonperformance of the employee's duties constitutes seeking employment. Seeking employment, however, does not encompass (a) merely requesting a job application; (b) submitting resumes or other employment proposals to an entity or person that is not affected by the performance or nonperformance of the employee's duties; or (c) submitting resumes or other employment proposals to an entity or person affected by the performance or nonperformance of the employee's duties only as part of an industry or discrete class. In such circumstances, an employee will be considered to have begun seeking employment upon receipt of any response indicating an interest in employment discussions.

(3) If the employee made a response other than rejection to an unsolicited communication from any prospective employer regarding possible employment. A response that defers discussions until the foreseeable future does not constitute rejection of an unsolicited employment proposal.

b. An employee is no longer seeking employment<sup>10</sup> when:

(1) the employee or the prospective employer rejects the possibility of employment and all discussions of possible employment have terminated; or

(2) two months have expired after the employee's unsolicited communication and the prospective employer has not responded or indicated interest in such employment.

c. An employee can avoid violating this restriction by disqualifying himself from participating in any Government matters in which the prospective employer has a financial interest. The disqualification procedures are the same as those set forth in paragraph IIB1b above.

d. The standards of conduct not only prohibit actual violations of the rules, but also proscribe any acts or decisions which could reasonably be expected to create the appearance of:

(1) using public office for private gain;

(2) giving preferential treatment to any person or entity;

(3) impeding Government efficiency or economy;

(4) losing impartiality;

(5) knowingly making unauthorized commitments or promises of any kind purporting to bind the Government;

(6) engaging in outside employment or activities, including seeking or negotiating for employment, that may conflict with official duties and responsibilities;

(7) using nonpublic Government information or allowing the improper use of such information to further any private interest; or

(8) adversely affecting the confidence of the public in the integrity of the Government.<sup>11</sup>

Put simply, it is not enough to protect against actual or obvious violations; DON personnel are also required to refrain from any acts or decisions that might result in, or create the appearance, to a reasonable person with knowledge of relevant facts, of a violation.<sup>12</sup> Applying these principles to the employment search setting, an employee should not, while still on active duty, or employed by DON:

(1) permit the prospect of employment to affect the performance or nonperformance of official duties;

(2) communicate nonpublic or privileged information to a prospective employer; or

(3) take any action that would affect the public's confidence in the integrity of the Government even if it is not an actual violation of the law.

3. Waivers and authorizations. In limited circumstances, a waiver or authorization may be obtained to allow an employee to take an official action that involves a prospective employer. Contact an ethics counselor whenever you seek to obtain a waiver or authorization.

a. Waiver of the criminal and regulatory prohibition. An employee may participate in a particular matter involving an employer that he or she is negotiating with for employment after he or she has first obtained a written waiver issued under 18 U.S.C. § 208(b)(1). After consultation with the Office of Government Ethics, the Government official responsible for appointing the employee to his position/duties is authorized to issue the waiver. A waiver may be issued when the official determines in writing that the employee's interest is not so substantial as to affect the integrity of the employee's actions. Additionally, under § 208(b)(3), the Assistant for Administration, Office of the Under Secretary of the Navy, may issue a waiver to a special Government employee on a Federal advisory committee when the employee's service outweighs any potential conflicts of interest created by a financial interest. The employee seeking a waiver must advise his or her supervisor of the nature and circumstances of the conflicting interest, coordinate with an ethics counselor, and obtain written permission to participate before taking the action affecting the prospective employer.

b. Authorization. In certain circumstances, an authorization from a designated agency official may be obtained to permit participation in the official matter by an employee who intends to engage in conduct that constitutes seeking employment, but does not constitute negotiations under § 208. If the conduct constitutes "negotiations," then a waiver, instead of an authorization, must be obtained.

#### 4. Examples

a. An employee is auditing the accounts of a DON contractor. While at the contractor's headquarters, the head of the contractor's accounting division tells the employee that his division is thinking about hiring another accountant and asks whether the employee might be interested in leaving DON. The DON employee says she is interested in knowing what kind of work would be involved. They discuss the duties of the position and her

qualifications. They do not discuss salary. The head of the division explains that he has not yet received authorization to fill the particular position and offers to get back to her when he obtains the necessary approval for additional staffing. The employee and the contractor's official have engaged in negotiations regarding future employment. The employee must disqualify herself from taking any action that involves that contractor. If she continues to take official action regarding the contractor, she would violate both the criminal and regulatory prohibitions discussed above. To be able to take official action that involves the contractor while engaged in negotiations with it, she would need to first obtain a waiver under § 208, vice an authorization.

b. An aviator assigned to NAVAIR and evaluating new landing gear has mailed his resume to 50 defense contractors involved in manufacturing naval aviation equipment. He has begun seeking employment with contractors involved in the manufacture of landing gear. He has not begun seeking employment with any of the remaining contractors. This is so because the remaining contractors are not directly affected by the performance or nonperformance of the aviator's duties or would be affected only because they are part of the aviation industry.

c. A special agent of the Naval Criminal Investigative Service has been working as a member of a team investigating six defense contractors in a possible contract fraud scheme. The special agent sends his resume to a contractor that is a target of the investigation. The special agent has begun seeking employment with that contractor and will be seeking employment for 2 months from the date the resume was mailed since the contractor is directly affected by performance of the agent's duties. If, however, he withdraws the resume or is notified within the 2-month period that his resume has been rejected, he will no longer be seeking employment with the contractor as of the date he makes such withdrawal or receives such notification.

### **C. Procurement Integrity Act -- restrictions on seeking non-Federal employment for employees involved in procurement**

1. **Background.** The Procurement Integrity Act, 41 U.S.C. § 423, imposes job searching restrictions on Federal employees who have been involved in agency procurements. The Act was significantly amended by the FY-96 Defense Authorization Act<sup>13</sup> and is implemented in part 3.104 of the Federal Acquisition Regulation (FAR).<sup>14</sup> The Act contains notification and disqualification requirements for employees who contact or are contacted by bidders or offerors regarding non-Federal employment, and prohibits disclosure of certain information relating to ongoing procurements. The Act also contains a provision, discussed in Chapter IV, which bars certain employees who were involved in large procurements from employment with certain private employers for a period of 1 year. Employees or organizations that violate the Procurement Integrity Act are subject to criminal and civil penalties as outlined in paragraph 4, below.

2. **Actions required of employees who are contacted regarding non-Federal employment.**<sup>15</sup> The Act requires an employee who is "personally and substantially" participating in an agency procurement (*i.e.*, a competitively awarded contract) in excess of the simplified acquisition threshold (currently \$100,000), and who contacts, or is contacted by, a bidder or offeror in that procurement regarding possible non-Federal employment, to promptly report the contact in writing to the official's supervisor and to the agency Designated Agency Ethics Official (*i.e.*, the Navy General Counsel) or designee (ethics counselor) and to either reject the possibility of non-Federal employment; or disqualify himself from further participation in the procurement in accordance with the procedures set forth in paragraph d, below. Disqualification lasts until such time as the agency authorizes the official to resume participation in such procurement because the person is no longer a bidder or offeror in that Federal agency procurement, or all discussions with the bidder or offeror regarding possible non-Federal employment have terminated without an agreement or arrangement for employment.

a. "Participated personally and substantially," as defined in FAR 3.104-3, means active and significant involvement in activities directly related to the procurement, to include:

- (1) drafting, reviewing, or approving the specification or statement of work for the procurement;
- (2) preparing or developing the solicitation;
- (3) evaluating bids or proposals, or selecting a source;
- (4) negotiating price or terms and conditions of the contract; and
- (5) reviewing and approving the award of the contract.

b. To participate "personally" means to participate directly, and includes the direct and active supervision of a subordinate's participation. To participate "substantially" means that the employee's involvement is of significance to the matter.

c. Substantial participation requires more than official responsibility, knowledge, perfunctory involvement, or involvement on an administrative or peripheral issue. Participation may be substantial even though it is not determinative of the outcome of a particular matter. A finding of substantiality should be based not only on the effort devoted to a matter, but on the importance of the effort. While a series of peripheral involvements may be insubstantial, the single act of approving or participating in a critical step may be substantial. However, the review of procurement documents solely to determine compliance with regulatory, administrative, or budgetary procedures, does not constitute substantial participation in a procurement. Generally, an individual will not be considered to have participated personally and substantially in a procurement solely by participating in:

- (1) agency level boards, panels, or other advisory committees that review program milestones or evaluate and make recommendations regarding alternative technologies or approaches for satisfying broad agency level missions or objectives;
- (2) the performance of general, technical, engineering, or scientific effort having broad application not directly associated with a particular procurement, notwithstanding that such general, technical, engineering, or scientific effort subsequently may be incorporated into a particular procurement;
- (3) clerical functions supporting the conduct of a particular procurement; or
- (4) procurements to be conducted under the procedures of OMB Circular A-76, participation in management studies, preparation of in-house cost estimates, preparation of "most efficient organization" analyses, and furnishing of data or technical support to be used by others in the development of performance standards, statements of work, or specifications.

d. Disqualification. FAR 3.104-6 sets forth disqualification procedures. An employee required to disqualify himself from a procurement shall submit, prior to initiation or engaging in employment discussions, a written notice of disqualification from further participation in the procurement to the Head of the Contracting Activity (HCA) or designee. Concurrent copies must be submitted to the contracting officer, the Source Selection Authority, and the agency official's immediate supervisor. At a minimum, the notice shall:

- (1) identify the procurement;
- (2) describe the nature of the employee's involvement in the procurement and specify the approximate dates or time period of participation; and
- (3) identify the bidder or offeror and describe its interest in the procurement.

The agency must disqualify the employee and may not force the employee to terminate employment discussions.

3. Prohibition on divulging or obtaining protected procurement information prior to the award of a Federal procurement.<sup>16</sup> The Procurement Integrity Act prohibits present and former U.S. officials, including members of the Armed Forces, from disclosing contractor bid or proposal information or source selection information before the award of a Federal agency procurement contract. The Act also prohibits other individuals from obtaining such information before the award of a Federal agency procurement contract.

a. The Act defines the terms "contractor bid or proposal information" to include any of the following information submitted to a Federal agency as part of or in connection with a bid or proposal to enter into a Federal agency procurement contract, if that information has not been previously made available to the public or disclosed publicly:<sup>17</sup>

(1) cost or pricing data (as defined by 10 U.S.C. § 2306a(h) with respect to procurements subject to that section, and 41 U.S.C. § 254b(h), with respect to procurements subject to that section);

(2) indirect costs and direct labor rates;

(3) proprietary information about manufacturing processes, operations, or techniques marked by the contractor in accordance with applicable law or regulation; or

(4) information marked by the contractor as "contractor bid or proposal information," in accordance with applicable law or regulation.

b. Further, the Act defines "source selection information" as any of the following information prepared for use by a Federal agency for the purpose of evaluating a bid or proposal to enter into a Federal agency procurement contract, if that information has not been previously made available to the public or disclosed publicly:<sup>18</sup>

(1) bid prices submitted in response to a Federal agency solicitation for sealed bids, or lists of those bid prices before public bid opening;

(2) proposed costs or prices submitted in response to a Federal agency solicitation, or lists of those proposed costs or prices;

(3) source selection plans;

(4) technical evaluation plans;

(5) technical evaluations of proposals;

(6) cost or price evaluations of proposals;

(7) competitive range determinations that identify proposals that have a reasonable chance of being selected for award of a contract;

(8) rankings of bids, proposals, or competitors;

(9) the reports and evaluations of source selection panels, boards, or advisory councils; or

(10) other information marked as "source selection information" based on a case-by-case determination by the head of the agency, his designee, or the contracting officer that its disclosure would jeopardize the integrity or successful completion of the Federal agency procurement to which the information relates.

4. Penalties.<sup>19</sup> Individuals who violate the Procurement Integrity Act are subject to civil fines of up to \$50,000 plus twice any compensation the employee received or was offered for the prohibited conduct. In addition, individuals who divulge procurement information in violation of the Act may face prosecution and imprisonment up to 5 years. Organizations are subject to civil fines of \$500,000 plus twice any compensation received or offered for the prohibited conduct. In addition, contractors are subject to other administrative actions such as cancellation of the procurement, rescission of the contract, and debarment proceedings.

**D. Job search expenses.** Hunting for a job can be costly and your prospective employer may offer to defray some of the expenses. Under the Joint Ethics Regulation, an employee may accept travel benefits, including meals, lodging, and transportation, if customarily provided by a prospective employer in connection with bona fide employment discussions, even if tendered by a DOD contractor.<sup>20</sup> If the prospective employer has an interest that could be affected by the performance or nonperformance of your duties, you may accept payment for such expenses only if you first comply with the disqualification requirements discussed in paragraph IIB1b above.

**E. Working during terminal leave.** If there is no bar to your employment with a specific defense contractor, generally speaking, you may begin working for, and receive compensation from, a defense contractor while you are on terminal leave.<sup>21</sup> In addition, by statute, you may, while on terminal leave, receive compensation from a Federal civilian position in addition to the pay and allowances from the unexpired portion of your terminal leave.<sup>22</sup> However, since you remain on active duty while on terminal leave, the following limitations apply:

a. If you file a financial disclosure report (either an OGE form 450 or SF 278), and you plan to work for a Navy contractor or other "prohibited source" while on terminal leave you must obtain written permission from your "agency designee" before you begin employment.<sup>23</sup> Your agency designee is your first supervisor in the chain of command who is a commissioned military officer or civilian above the grade of GS/GM-11. Except in remote locations, the agency designee may act only after consultation with his ethics counselor. The agency designee for any flag or general officer in command and any civilian Presidential appointee confirmed by the Senate, is that person's ethics counselor.<sup>24</sup>

b. Section 205 of title 18 United States Code, is a criminal statute that prohibits a military officer (not enlisted personnel) or Federal civilian employee from representing any entity other than the United States before any Federal court or agency. Similarly, 18 U.S.C. § 203 prohibits officers and civilian employees from "directly or indirectly" receiving compensation for representational services rendered "either personally or by another" before the U.S. Government. These provisions apply while a military officer remains on terminal leave. They no longer apply to a military officer after his retirement.<sup>25</sup>

c. A military officer may not accept "civil office" with a state or local government, nor may he or she perform the duties of such office while on terminal leave.<sup>26</sup> A "civil office" is a position in which some portion of a state's sovereign power is exercised. For example, a county clerk position is considered a "civil office."<sup>27</sup> This prohibition does not apply to enlisted or civilian personnel.

**F. Endnotes**

1. 18 U.S.C.A. § 216 (West Supp. 1996).
2. Standards of Ethical Conduct for Employees of the Executive Branch, 5 C.F.R. § 2635.604(b) (1996).
3. United States v. Hedges, 912 F.2d 1397 (11th Cir. 1990); United States v. Schaltenbrand, 930 F.2d 1554 (11th Cir. 1991).
4. 5 C.F.R. § 2635.603(b)(1)(i).
5. See Hedges, 912 F.2d 1397; Schaltenbrand, 930 F.2d 1554.
6. See Hedges, 912 F.2d 1397; Schaltenbrand, 930 F.2d 1554.
7. Standards of Ethical Conduct for Employees of the Executive Branch, 5 C.F.R. § 2635 (1996). It is incorporated into Chapter 2 of the Joint Ethics Regulation, DOD 5500.7-R of August 30, 1993.
8. Id. § 2635.604(a).
9. Id. § 2635.603(b).
10. Id.
11. Id. § 2635.101.
12. Id. § 2635.101(b).
13. National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, § 4304, 110 Stat. 186, 659-65 (Procurement Integrity Act provisions to be codified at 41 U.S.C. § 423).
14. 62 Fed. Reg. 226 (1997) (to be codified at 48 C.F.R. §§ 3.104-3.104-11)
15. National Defense Authorization Act for Fiscal Year 1996 § 4304(a), 110 Stat. at 660 (to be codified at 41 U.S.C. § 423(c)).
16. Id., 110 Stat. at 659 (to be codified at 41 U.S.C. § 423(a)-(b)).
17. Id., 110 Stat. at 662 (to be codified at 41 U.S.C. § 423(f)(1)).
18. Id., 110 Stat. at 662-63 (to be codified at 41 U.S.C. § 423(f)(2)).
19. Id., 110 Stat. at 661 (to be codified at 41 U.S.C. § 423(e)).
20. Standards of Ethical Conduct for Employees of the Executive Branch, 5 C.F.R. § 2635.204(e)(3) (1996).
21. Former 37 U.S.C. § 801(a) prohibited Regular Navy and Marine Corps officers from beginning to work for certain companies while on terminal leave. This section was repealed as part of the Ethics Reform Act of 1989, Pub.L.No. 101-194, 103 Stat. 1716.
22. 5 U.S.C.A. § 5534a (West 1996).



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23. DOD 5500.7-R of Aug. 1993, Joint Ethics Regulation, §§ 2-206, 3-306.
  24. Id. § 1-202.
  25. 18 U.S.C.A. § 206 (West 1996).
  26. Id. § 9-901(b); 10 U.S.C.A. § 973(b) (West Supp. 1996).
  27. In the Matter of Major Robert C. Crisp, USAF, 56 Comp.Gen. 855 (1977).

**G. Sample document--Notice of employment contact and 18 U.S.C. § 208 disqualification**

Date

From: You  
To: Your Supervisor and agency DAEO or designee  
Subj: NOTICE OF NEGOTIATING OF PROSPECTIVE EMPLOYMENT WITH (NAME OF PRIVATE ENTITY)  
Ref: (a) 18 U.S.C. § 208

1. This is to inform you, in accordance with reference (a), that on (date) I (have contacted) (have been contacted by), and am negotiating prospective employment with (name of private entity). The substance of this contact was (a brief description of the substance of the contact). Since I have not rejected this employment opportunity, I am disqualified from taking any Government action relative to the interests of (name of private entity) or its subsidiaries and affiliates. I shall refer any matters involving (name of private entity) to you for appropriate action.

Your Signature  
Title

Copy to:  
Immediate Subordinates  
Ethics Counselor  
Prospective Employer

-----  
Date

From: Supervisor  
To: You

Subj: DISQUALIFICATION CONFIRMATION

1. Since you are negotiating prospective employment with (name of private entity), which does business with the Department of Defense, you are disqualified from taking any Government action in connection with matters involving (name of private entity) and its subsidiaries and affiliates.

2. As a result of this disqualification, you and, by copy of this endorsement, your immediate subordinates are directed to refer to me all official matters involving (name of private entity) that would normally come to you for action.

Supervisor's Signature  
Title

Copy to:  
Immediate Subordinates  
Ethics Counselor  
Prospective Employer  
Agency DAEO or Designee

**H. Sample document--Procurement Integrity Act disqualification**

Date

From: You  
To: Head of the Contracting Activity (or designee)  
Subj: NOTICE OF NEGOTIATING OF PROSPECTIVE EMPLOYMENT WITH (NAME OF PRIVATE ENTITY) AND DISQUALIFICATION  
Ref: (a) 41 U.S.C. § 423

1. This is to inform you, in accordance with reference (a), that on (date) I (have contacted) (have been contacted by), and am negotiating for prospective employment with (name of private entity). The substance of this contact was (a brief description of the substance of the contact). I am the (describe nature of involvement with contract) with respect to a contract in which (name of private entity) is a bidder or offeror. I have been involved in this contract from (dates).

2. Under reference (a), I am disqualified from taking any Government action relative to the interests of (name of private entity) or its subsidiaries and affiliates. I shall refer any matters involving (name of private entity) to you for appropriate action.

Your Signature  
Title

Copy to:  
Contracting Officer  
Source Selection Authority  
Immediate Supervisor  
Immediate Subordinates  
Ethics Counselor  
Prospective Employer  
Agency DAEO or Designee

### III. FEDERAL EMPLOYMENT RESTRICTIONS ON RETIRED AND FORMER MILITARY PERSONNEL

#### A. Dual compensation laws

##### 1. Background

a. The following discussion only addresses the application of the dual compensation laws to retired or former military personnel. While there are dual compensation laws that apply to Federal civilian employees who retire and subsequently engage in Federal employment,<sup>1</sup> it is beyond the scope of this pamphlet to address the application of such laws to civilian personnel.

b. There are two provisions in the current dual compensation law which may operate to reduce the retired or retainer pay of retired or former members of the naval service employed in Federal civilian positions. The retired or retainer pay of some former members of the Armed Forces may be reduced if they are employed in Federal civilian positions. These reductions are the result of a series of dual compensation statutes passed by Congress since 1894.<sup>2</sup> The current law, the Dual Compensation Act of 1964, as amended, generally applies to retired Regular officers, who retired at any time, and to all former members who left active duty after January 11, 1979. There are, however, many exceptions to this general rule. The application, interpretation, and exceptions to applicability of the dual compensation reductions are discussed below. Certain other items of interest to retired and former members employed by, or seeking employment with, the Federal Government are also examined. To facilitate discussion, the term "former member(s)" shall mean anyone, officer or enlisted, entitled to receive retired or retainer pay, including retirees and members of the Fleet Reserve and Fleet Marine Corps Reserve. The term "retired pay" includes both retired and retainer pay.

2. The first reduction provision. The first reduction provision applies only to retired Regular officers. This provision operates to reduce the retired pay of a retired Regular officer receiving pay from a Federal civilian position regardless of the amount of salary from that position. It provides that such officer is entitled to receive the full pay of the civilian position, but his retired pay will be reduced to an annual rate equal to a base amount of the retired or retainer pay plus one-half of the remainder, if any. The base amount (\$10,104.46 as of this writing) is adjusted periodically to reflect changes in the Consumer Price Index.<sup>3</sup> Thus, a retired Regular officer while employed in a Federal civilian position will receive the full salary of the civilian position, plus the first \$10,104.46 of military retired pay, plus one-half of the remainder of retired pay. For example, a retired Regular officer entitled to \$25,000 retired pay per year would, during a year of Federal civilian employment, receive the full salary of the civilian position plus \$17,522.23 in reduced retired pay [ $\$10,104.46 + 1/2(\$25,000 - \$10,104.46)$ ]. In this case, the retired Regular officer would have his retired pay reduced by \$7,447.77.

##### 3. The second reduction provision

a. The second reduction provision operates to reduce the retired pay of all former members of a uniformed service first receiving retired pay after January 11, 1979, based upon the amount of salary received from the Federal civilian position. It provides that a former member who is employed in a Federal civilian position shall have his retired or retainer pay reduced if the annual rate of basic pay for the Federal civilian position, when combined with the former member's annual rate of retired or retainer pay (reduced in the case of retired Regular officers as discussed in section IIIA2), exceeds the rate of basic pay then currently paid for level V of the Executive Schedule (\$108,200 as of this writing).<sup>4</sup> The amount of each reduction allocable for any pay period in connection with such employment shall be equal to the retired or retainer pay allocable to the pay period (reduced in the case of retired Regular officers as discussed in section IIIA2), except that the amount of this reduction may not result in:

(1) The amount of retired pay allocable to the pay period after being reduced, when combined with basic pay for the employment during the pay period, being at a rate less than the rate of basic pay then currently

paid for level V of the Executive Schedule.<sup>5</sup> That is, if the combination of the civilian salary and retired pay for the pay period in question exceeds the amount currently paid for level V of the Executive Schedule, the retired or retainer pay will be reduced until the total pay is equal to that of the level V limit. Retired pay will not be reduced under this provision if the combined total does not exceed the level V limit.

(2) The amount of retired pay being reduced to an amount less than the amount deducted from the retired pay as a result of participation in any survivor benefit program in connection with retired or retainer pay or veterans insurance programs.<sup>6</sup> In other words, no deduction from retired pay will be made that would leave an insufficient amount to meet the cost of any current obligation that supports survivor's benefits or veterans insurance programs.

b. The civilian salary, whether it exceeds the level V limit or not, will never be reduced. On the other hand, the amount received as civilian salary, even if not authorized, must be included in computing the reduction in retired pay. For example, a retired officer employed in a Federal position for which no annual bonus was authorized received what his supervisor called a "bonus" but which actually was awarded by temporarily raising his rate of civilian pay. The Comptroller General ruled that this amount, mischaracterized as a bonus, must be included in computing the officer's reduction in retired pay.<sup>7</sup> The amount of the retired pay reduction required for any given pay period may not be refunded to a retiree even though the retiree's combined retired or retainer pay and civilian salary for the entire year may be less than the annual pay prescribed for level V of the Executive Schedule.<sup>8</sup>

c. Examples. The application of this provision may be illustrated by a series of examples. For all examples, assume we are dealing with a retired Regular officer entitled to \$25,000 retired pay per year. Because of the first reduction provision, retired pay is reduced to \$17,552.23 during a year of Federal civilian employment. Any further reduction is determined by the amount of the civilian salary.

(1) If the former member's Federal civilian salary is \$60,000 per year, no further reduction of retired pay would occur since the yearly total rate of retired pay and civilian salary would equal \$77,552.23, which is less than \$108,200, the current rate of basic pay for level V.

(2) If the former member's Federal civilian salary is \$100,000 per year, the yearly total rate of retired pay and civilian salary would equal \$117,552.23 (\$17,552.23 + \$100,000). Retired pay would be reduced by the amount that the total exceeds the rate for level V. (\$117,552.23 - \$108,200 = \$9,352.23). So, the member would receive \$8,200 in retired pay (\$17,552.23 - \$9,352.23 = \$8,200).

(3) If the member in the above example contributes \$15,000 to survivor's benefits, he would retain \$15,000 retired pay instead of having his retired pay reduced to \$8,200. This is because under the second reduction provision, retired pay may not be reduced below the amount of the member's contribution to survivor's benefits.

We emphasize that the formulas used in these examples only illustrate the concepts of the current law. Actual computations performed by military finance centers are based on pay periods, not years, and involve additional factors, such as taxes and accounting procedures that are beyond the scope of this publication. Also, keep in mind that the base amount (\$10,104.46) used for the computations under the first reduction provision and the basic rate of pay for level V of the Executive Schedule (\$108,200) used for the second reduction provision, although current at the time of publication, change periodically.

4. Interpretation of the dual compensation laws. To determine whether a former member is subject to either of the previously discussed limitations on compensation, we must understand some statutory definitions and administrative decisions.

a. Who is a retired Regular officer? The term "officer," as used in the first reduction provision (applicable only to retired Regular officers), is defined as a commissioned or warrant officer.<sup>9</sup> The following categories of officers are subject to the first reduction provision:

- (1) regular commissioned officers retired for years of service;
- (2) retired Regular warrant officers of all warrant grades;
- (3) Regular officers retired for noncombat-related disability; and
- (4) temporary Regular officers retired in officer or warrant officer grades pursuant to 10 U.S.C.

§ 6323.

b. Personnel not subject to the first provision. The following categories of personnel are not subject to the first reduction provision:

- (1) retired Reserve officers;
- (2) retired enlisted members;
- (3) temporary officers and warrant officers retired in enlisted status and advanced on the retired list to officer grades;
- (4) Regular commissioned and warrant officers retired for disability resulting either from injury or disease received in the line of duty as a direct result of armed conflict or caused by an instrumentality of war and incurred in the line of duty during a period of war (discussed in detail later in section IIIA5a); and
- (5) temporary Regular officers retired in enlisted grades whether for longevity or disability, who are subsequently advanced on the retired list to officer status pursuant to 10 U.S.C. § 6151, if they apply to the concerned Secretary within 3 months of the advancement to maintain a permanent enlisted status and thus avoid the consequences of the first reduction provision. Failure to so apply, without adequate justification, will cause the member to be subject to the first reduction provision.<sup>10</sup>

c. Other categories. Temporary Regular officers retired in their officer grade under 10 U.S.C. § 6323 are considered to be retired as officers and are subject to the first reduction provision.<sup>11</sup> Members retired for physical disability while serving in temporary officer status are retired in such grade and status pursuant to 10 U.S.C. § 1372 and are subject to the first reduction provision. Members who hold no status other than their permanent enlisted status at the time of retirement are not subject to the first reduction provision even though they are retired pursuant to 10 U.S.C. § 1372 in an officer grade based upon prior temporary officer status.<sup>12</sup> The rules concerning Regular commissioned and noncommissioned warrant officers are essentially the same. Warrant officers are subject to the operation of the first reduction provision if retired for longevity or noncombat-related disability. Temporary warrant officers retired in their warrant officer grade under 10 U.S.C. § 6323 are considered to be retired as officers and are subject to the first reduction provision. A temporary warrant officer retired in an enlisted status and subsequently advanced to warrant officer status under 10 U.S.C. § 6151 is exempt only if he applies to the Secretary within 3 months of advancement to be restored to his or her enlisted status.<sup>13</sup> Temporary warrant officers retired under 10 U.S.C. § 1372 for noncombat-related disability while serving in a warrant grade are subject to the first reduction provision. Those whose disability retirement occurred while serving in enlisted status and who were placed on the retired list in a warrant grade pursuant to 10 U.S.C. § 1372 based solely upon prior temporary warrant status are not.<sup>14</sup>

d. What is a Federal position? The term "position," as used in both reduction provisions, is defined as a civilian office or position (including a temporary, part-time, or intermittent position), appointive or elective, in

the legislative, executive, or judicial branches of the Government of the United States (including a Government corporation and a nonappropriated fund instrumentality under the jurisdiction of the Armed Forces) or in the Government of the District of Columbia.<sup>15</sup>

(1) Prior to the Dual Compensation Act of 1964, nonappropriated fund activities were not included in the statutory definition of "position." The 1964 Act expanded its restrictions to include nonappropriated fund instrumentalities under the jurisdiction of the Armed Forces that were previously exempt.<sup>16</sup> In addition, the Comptroller General has ruled that the language "under the jurisdiction of the Armed Forces" does not imply that nonappropriated fund instrumentalities outside of the Department of Defense are per se exempt from the scope of the Dual Compensation Act. Rather, only positions with nonappropriated instrumentalities that are clearly separated from access to Federal revenues will not be considered "Federal" positions. Essentially, any position with a Government corporation, commission, or office that is created by statute or that is controlled by an agency funded with Federal revenues (i.e., appropriated funds) is a Federal position and, therefore, subject to the Act.<sup>17</sup> Thus, positions with the Office of the Comptroller of the Currency (OCC) and the Federal Deposit Insurance Corporation (FDIC) were held to be Federal positions. It does not matter that the operations of OCC and FDIC are funded by assessments and fees from banks and not from appropriated funds. OCC is a bureau within the Department of the Treasury, subject to the control of the Secretary of the Treasury. FDIC, similarly, is a statutorily created Government corporation, which is explicitly included in the Act's definition of "position." Also, a position with the Panama Canal Commission was held to be a Federal position because the user fees it collected were deposited into a general Treasury account and then disbursed according to appropriations bills.<sup>18</sup> As such, the Commission could not be considered as being clearly separated from access to Federal revenues to exempt a position with it from the Act. Despite this broadened definition, however, not all Federal employment is covered by the dual compensation reduction provisions.

(2) Employment performed under contracts with the Government, such as work on a per diem or fee basis as a special advisor or consultant, does not automatically subject the former member to either of the pay reduction provisions. For example, contract arbitrators who investigate, supervise, and render advisory decisions on labor-management relations matters free from Government supervision or control are independent contractors rather than Federal employees. Any individual who is responsible only for an end result, such as the rendering of an advisory decision or determination, and who is required by the nature of that service to attain the result free of Government supervision or control is an independent contractor rather than an employee.<sup>19</sup> Determining whether an individual performing work for the Government is an employee or an independent contractor depends largely upon the extent to which Federal officials supervise his or her work. Direct Federal supervision of day-to-day activities is strong evidence of an employer-employee relationship. On the other hand, when Federal officials are concerned only with the end product, and they exercise little or no supervision over daily performance, an independent-contractor relationship exists. Actual exercise of control over an employee is not required; only the right of the employer to control and direct the employee's work performance is necessary for an employer-employee relationship to exist. In applying this test, the Comptroller General held that retired officers serving as coaches under personal services contracts with the Air Force Academy Athletic Association held Federal positions and, therefore, were subject to the dual compensation reduction provisions.<sup>20</sup> These coaches were subject to the supervision of the Superintendent of the Air Force Academy under authority delegated by the Secretary of the Air Force. Likewise, coaches under personal services contracts with the U.S. Military Academy are subject to the Dual Compensation Act because they, too, are subject to the supervision of Government officials.<sup>21</sup> On the other hand, employees of the Naval Academy Athletic Association (NAAA) are not subject to the Dual Compensation Act since NAAA is a purely voluntary group not required by law or regulation to function under the Navy's jurisdiction.<sup>22</sup>

(3) The Comptroller General has ruled that retired officers compensated as court-appointed attorneys for indigent defendants in Federal courts under the Criminal Justice Act of 1964<sup>23</sup> do not hold a Federal position for purposes of the Dual Compensation Act.<sup>24</sup> The Comptroller General held that, although an attorney is technically appointed defense counsel by the court and is traditionally considered an officer of the court, he does not hold office in the judicial branch of the Government because the usual elements establishing an

employer-employee relationship are absent. In a long line of cases construing former dual compensation laws, courts have consistently held that to be considered a Federal position, it must have Federal functions, duties, and responsibilities, as well as the elements of appointment, tenure, duration, and salary.<sup>25</sup>

(4) Similar distinctions have been drawn in decisions exempting various types of fee-basis employment.<sup>26</sup> In one instance a retired Regular Medical Corps officer, paid on a fee basis to examine Armed Forces personnel pursuant to a contractual relationship that provided for a \$7 fee for each examination, was held not to occupy a Federal civilian position. His retired pay was, therefore, not subject to reduction. That, by contractual arrangement, a total fee limitation of \$50 per day was set as the maximum amount the physician could receive for services did not change the contractual relationship to that of employer-employee.<sup>27</sup> In another instance, an officer did not hold a Federal civilian position where, upon retirement, the officer was employed on a fee basis as a civilian dentist in a family dental clinic established at a military installation. The clinic was neither a Federal instrumentality nor a nonappropriated fund activity. The retired officer served as a civilian dentist without a contract or tenure of employment, free from Federal control or supervision. Compensation was received on the basis of individual fees less Social Security taxes and a share of the clinic's operating expenses.<sup>28</sup>

(5) Even if a retired member performing contractual services for the Government may be subject to supervision by Government employees, such employment may not be considered a "Federal" position for dual compensation purposes when the agency has specific statutory authority to enter into such a contract. Under 10 U.S.C. § 1091, the secretaries of the military departments are authorized to contract "with persons for services (including personal services) for the provision of direct health care services. . . ." An implementing regulation permits these personal service contracts "when in-house sources are insufficient to support the medical mission of the military department."<sup>29</sup> Individuals who perform services under contracts arising from such specific statutory authority do not become Federal employees in the absence of an actual appointment to an established position in the Government. Therefore, when the military departments enter into such statutorily authorized personal service contracts for health care services with military retirees, a "Federal" position is not occupied and the dual compensation provisions do not apply to such employment.<sup>30</sup>

(6) The Comptroller General has also held that a retired Regular officer employed by a nonappropriated fund activity to prepare a manuscript concerning wartime events, was an independent contractor and not a Federal employee. The agency exercised no supervisory control over the individual in the performance of assigned duties, although he was required to periodically submit all drafts for review and to have the final product completed prior to a specified deadline.<sup>31</sup> (Actual employees of DOD nonappropriated fund instrumentalities are, however, subject to the Dual Compensation Act's reduction provisions.<sup>32</sup>) In other cases discussing the nature of a "Federal" position, the Comptroller General has said that a retired Marine Corps Regular officer, while employed as a business manager of the Marine Corps Association, was not subject to the pay reduction formula of the Dual Compensation Act. Membership in the association is voluntary and it obtains revenue from dues, investments, and the publication of a periodical. Additionally, the United States Marine Corps exercises no jurisdiction over this association. It is not a Federal instrumentality, notwithstanding the fact that positions of leadership and authority in the organization are held by Marine Corps officers.<sup>33</sup> In another decision, a retired Regular officer employed intermittently by a nonappropriated fund instrumentality as a flight instructor on an hourly basis with no guaranteed minimum salary was subject to the operation of the Dual Compensation Act. A reduction of a full day's retired pay was required even when only 1 hour's pay was received for a given day.<sup>34</sup> This harsh decision was later modified so that the daily total of civilian pay and reduced retired pay could not be less than a full day's retired pay.<sup>35</sup>

(7) Despite the foregoing discussion, the dual compensation laws generally apply to the holding of any civilian office or position, appointive or elective, including temporary, part-time, or intermittent positions, in any branch of the Federal Government, in the Government of the District of Columbia, in nonappropriated fund instrumentalities, or in any Federally owned or controlled corporation.



5. Exceptions to applicability of the dual compensation reduction provisions. Certain former members are specifically exempt from any reduction in their retired pay under either of the two reduction provisions.

a. The combat-related disability exemption. The reduction in retired pay required by either provision does not apply to a former member receiving retired pay computed, in whole or in part, based upon disability:

- (1) resulting from injury or disease received in line of duty as a direct result of armed conflict; or
- (2) caused by an instrumentality of war and incurred in the line of duty during a period of war.<sup>36</sup>

In determining whether the disability exemption applies, the cause of the disability, rather than the percentage of disability, is the controlling factor. A direct causal relationship must be established between the disability upon which retired pay is based and either armed conflict or an instrumentality of war.<sup>37</sup> The existence of the requisite causal relationship is determined by a Physical Evaluation Board, a determination which may be appealed to the Judge Advocate General of the Navy.<sup>38</sup> The Comptroller General has said that great weight will be accorded the administrative determinations of the department involved concerning the bases of physical disability retirements in cases of this sort.<sup>39</sup> The Comptroller General has further ruled that it is only the disability for which a member is retired that may be considered in making this determination.<sup>40</sup> In other words, a combat-related injury or disability does not qualify a former member for the exemption unless it is also the basis of the member's disability retirement. To qualify for the disability exemption, the disability must have either occurred in the line of duty as a direct result of armed conflict or been caused by an instrumentality of war in line of duty during a period of war. "Period of war" is defined by statute and includes World War I (April 6, 1917 to November 11, 1918), World War II (December 7, 1941 to December 31, 1946), the Korean conflict (June 27, 1950 to January 31, 1955), the Vietnam era (August 5, 1964 to May 7, 1975), and the Persian Gulf War (August 2, 1990 and ending on a date thereafter prescribed by Presidential proclamation or law).<sup>41</sup> When this exemption applies, all retirement pay is excluded from both reduction provisions. This is true regardless of the percentage of disability (e.g., a qualified 30 percent disability results in a 100 percent exemption).

b. The disability exclusion (Veterans Affairs (VA) disability compensation). Qualification for the combat-related disability exemption above is determined by the department concerned (i.e., the Navy) and is evidenced by placement of the member's name on the Temporary Disability Retirement List or the Retired List with retired pay. Eligibility for VA disability compensation, on the other hand, is determined by the VA, independently of DON's determination as to whether the member is separated or placed on either the Retired List or the Temporary Disability Retired List. VA payments are made by the VA, and the former member must waive receipt of the dollar amount of any retired pay equal to the dollar amount of VA compensation in order to receive such benefits. VA disability compensation is not retired pay for purposes of the dual compensation law; therefore, it is excluded from computation in both reduction formulas.<sup>42</sup>

(1) Example: A retired Regular officer is entitled to \$25,000 retired pay per year. If rated partially disabled by the VA, resulting in a disability compensation award of \$8,000 per year, only \$17,000 of the retiree's pay is categorized as retired pay subject to reduction. During a year of employment in a Federal civilian position the retiree's pay would be reduced to \$21,552.23 per year [ $\$8,000 + \$10,104.46 + 1/2 (\$17,000 - \$10,104.46)$ ] because of the first dual compensation reduction provision. Comparing this result with that reached in our earlier example in section IIIA2a, the \$8,000 disability compensation results in an additional \$4,000 per year in total compensation to the former member.

c. The exception for days of leave without pay. No reduction in retired pay is required under either reduction provision for any day an employee is in a leave-without-pay status for the entire day.<sup>43</sup> Since operation of the reduction provisions is contingent upon receipt of salary, the provisions are not applicable to those periods of employment where no salary is received. For example, a retired Regular officer who is entitled to \$12,000 retired pay per year would normally receive \$1,000 per month. During a period of Federal civilian

employment, retired pay would be reduced in accordance with guidance previously provided in section IIIA2. During a 1-month period of leave without pay, however, retired pay would be the full \$1,000.

d. The temporary employment exemption. No reduction in retired pay is required under either reduction provision for the first 30-day period for which pay is received by a former member employed on a temporary (full-time or part-time) basis, any other part-time basis, or an intermittent basis.<sup>44</sup> This exemption only applies to the first 30 days in each fiscal year for which pay is received, regardless of whether such pay is derived from a single appointment or multiple appointments.<sup>45</sup> "Temporary" means appointments limited to 1 year or less; "part-time" means employment on less than a full-time basis under a prescheduled tour of duty; and "intermittent" means employment on less than a full-time basis with no prescheduled tour of duty.<sup>46</sup>

(1) The phrase "period for which pay is received" means the full calendar period for which pay is received while employed on a full-time basis, but only the days for which pay is actually received while employed on a part-time or intermittent basis. Thus, if the temporary employment is full-time (that is, regular employment merely having a limited duration), the 30 days are calculated for the full calendar period employed including Saturdays and Sundays. If the temporary employment is "part-time" or "intermittent" in nature, the 30 days are counted by days actually worked. A former member is limited to one such 30-day exemption per fiscal year.<sup>47</sup>

(2) In prorating retired pay under these provisions, months are treated as having 30 days and years as having 360 days. Thus, under the foregoing rules, and after expiration of the applicable 30-day grace period, the retired Regular officer illustrated in section IIIA2 (receiving \$25,000 retired pay per year or \$2,083 per month) would receive retired pay of \$48.67 (\$17,522.23 divided by 12 = \$1,460.18 divided again by 30) on the days actually worked in a part-time or intermittent position because of the first reduction provision. On days not worked the former member would receive the full retired pay of \$69.43 (\$2,083 divided by 30).

(3) Should the former member be employed in a full-time position lasting less than a year, retired pay would be paid at the reduced rate for the full duration of employment, including Saturdays and Sundays, but excluding days of leave-without-pay status. Thus, the retired pay of teachers employed pursuant to the Overseas Teachers Act, 20 U.S.C. §§ 901-07, will be reduced during recess periods within the school year (in addition to the days actually spent in school on class days) but not during summer recesses.<sup>48</sup> Retired pay for fractional months, before and after the term of employment, would be prorated on a daily basis. A retired Regular officer who did not begin receiving retired pay until after January 11, 1979, could, of course, have daily retired pay reduced even further by the second reduction provision if combined retired pay and civilian salary is greater than the amount paid for level V of the Executive Schedule. The amount of the retired pay reduction required for any given pay period also may not be refunded to a retiree even though the retiree's combined retired pay and civilian salary for the entire year may be less than the annual pay prescribed for level V of the Executive Schedule.<sup>49</sup>

e. Waivers

(1) Retirees may, in certain limited circumstances, obtain a waiver so that their retired pay would not be reduced during subsequent Federal employment.<sup>50</sup> The circumstances under which a waiver may be granted are:

(a) "on a case-by-case basis for employees in positions for which there is exceptional difficulty in recruiting or retaining a qualified employee;" or

(b) for temporary employment that "is necessary due to an emergency involving a direct threat to life or property or other unusual circumstances."<sup>51</sup>

(2) The Director of the Office of Personnel Management is the authority who may grant such waivers at the request of the head of an executive agency. Additionally, the Director may delegate to an agency the authority to grant waivers for the temporary employment of retirees during emergencies or other unusual circumstances, but not for employment necessitated by exceptional difficulties in recruiting or retaining qualified personnel.<sup>52</sup>

(3) The language of the statute ("unusual circumstances," "exceptional difficulty") indicates that waivers are to be the exception, not the rule. If appropriate, however, a waiver may be obtained for either or both of the dual compensation reductions. The procedures for obtaining a waiver are in 5 C.F.R. § 553.

(4) The provisions for waiver discussed above should not be confused with waiver of indebtedness resulting from an overpayment of retired pay when the dual compensation reductions rightly apply. In these cases, indebtedness to the Government resulting from an erroneous overpayment may be waived by the Comptroller General pursuant to 10 U.S.C. § 2774 if collection of the debt would be against equity and good conscience and not in the best interest of the United States. Waiver may not be granted, however, if there exists in connection with the debt, an indication of fault on the part of the member.<sup>53</sup> Administrative errors may provide a basis for waiver, but only until the point that the error is or should have been discovered. Thus, reliance on erroneous advice that a Federal position is exempt from the dual compensation reductions is proper only until the point where the retired officer learns that such advice was incorrect.<sup>54</sup> Conversely, waiver is not appropriate where one knows or should know that overpayments are being made due to the erroneous actions of finance center personnel, if reasonable actions are not taken by the retired officer to correct the situation.<sup>55</sup> A retiree is responsible for informing his retired pay authority that he has taken a Federal position.<sup>56</sup> Waiver requests must be filed within three years of the time the debt to the Government was discovered.

f. The exemption for those covered under prior statutes. The Dual Compensation Act of 1964 offered retired officers already employed in Federal civilian positions on November 30, 1964, the option of choosing between coverage under the 1964 Act or under the former dual compensation limitations already applicable to them.<sup>57</sup> Elections were to be made by March 1, 1965, and once made, became irrevocable. Those who made no formal election remained subject to the former law. Those officers, however, who chose to remain subject to pre-1964 Act limitations became subject to the reduction provision of the 1964 Act (applying to retired Regular officers) if reappointed, reinstated, or reemployed after November 30, 1964, following a break in service of more than 30 days.<sup>58</sup>

(1) In an unusual case, the Comptroller General held that a retired Regular officer who was employed by a nonappropriated fund activity before the effective date of the Dual Compensation Act of 1964, and, hence, exempt from its coverage, lost his exemption when the activity became an appropriated fund activity. When the retiree's civilian employment was converted to an appropriated fund position from a nonappropriated fund position, the former member, in this new status, became subject to the reduction provision of the 1964 Act.<sup>59</sup>

(2) The reduction provision in the pre-1964 Act did not apply to warrant officers. Thus, a retired warrant officer employed in a nonappropriated fund position on November 30, 1964 was entitled by virtue of such retired status under the election provision of the pre-1964 Act, when the employment was converted, after the effective date of the 1964 Act, to a position coming under an appropriated fund activity. Therefore, reemployment by an appropriated fund activity did not subject the officer to the reduction provision of the 1964 Act.<sup>60</sup> Similar reasoning was employed in a case in which a warrant officer, retired under the pre-1964 Act, changed employment, with no break in service, from an intermittent Federal civilian position to a full-time Federal position after the effective date of the 1964 Act. The warrant officer exemption was continued and the reduction provision of the 1964 Act did not apply.<sup>61</sup>

(3) Those former members who first received retired pay prior to the effective date of the current law (January 11, 1979) are not subject to the second reduction provision of that law nor will they become subject to that provision regardless of subsequent employment in a Federal civilian position.<sup>62</sup>

g. The exemption for some Reservists employed in a Federal civilian position on October 13, 1978. One particular class of former members is specifically excluded from the operation of the second reduction provision. The Civil Service Reform Act of 1978 exempted from its provisions individuals employed in a Federal civilian position on the date of enactment (October 13, 1978) as long as they continued to hold such position (disregarding any break in service of 3 days or less) and if, on October 13, 1978, they would have been entitled to retired pay but for the fact they did not satisfy an applicable age requirement.<sup>63</sup> Thus, former Reserve officers and Reserve enlisted members who, on October 13, 1978, were otherwise eligible to receive retired pay but for the fact they had not reached age 60 are not subject to the second reduction provision if they were so employed.

h. The exception for some medical officers. A very limited exception previously allowed the Office of Personnel Management (OPM), for 5 years after January 11, 1979, to exempt authorized medical officers from the Act's provisions when necessary to meet special or emergency employment needs resulting from a severe shortage of well-qualified candidates for medical officer positions that cannot otherwise be readily met.<sup>64</sup> This statute, however, was not extended beyond its initial expiration date of January 1984. Thus, medical officers employed in a Federal civilian position are subject to the reduction provisions.

i. Other exceptions. There are a number of other statutory exceptions for various specific federal positions. For example, the following positions are exempt from the dual compensation provisions: Certain members of arms control advisory panels;<sup>65</sup> physicians employed at the Armed Forces Retirement Home;<sup>66</sup> resident-employees of the Armed Forces Retirement Home;<sup>67</sup> certain members of the faculty at the Uniformed Services University of the Health Sciences;<sup>68</sup> the President of the James Madison Memorial Fellowship Program;<sup>69</sup> and certain air traffic controllers hired prior to December 31, 1989.<sup>70</sup>

j. The exclusions regarding officers on terminal leave and of severance pay. As a matter of additional interest, an officer who is on terminal leave pending separation or release from active duty may accept a Federal civilian position and, at the same time, receive the pay of that position in addition to the pay and allowances from the uniformed service for the unexpired portion of the terminal leave.<sup>71</sup> Severance pay is not basic pay "from a position" and so payment of severance pay is not affected by the dual compensation provisions.<sup>72</sup>

## **B. Employment in DOD**

1. To avoid appearances of favoritism or preferential treatment, 5 U.S.C. § 3326 prohibits the appointment of a retired member of the Armed Forces to a civil service position (including a nonappropriated fund activity) in DOD or a component thereof for 180 days after retirement unless:

a. the appointment is approved by the Secretary concerned or his designee;

b. the retiree is appointed to a position for which the basic rate of pay has been increased under 5 U.S.C. § 5303 (authorizing special pay for positions where recruitment efforts are significantly handicapped); or

c. a state of national emergency exists.

2. In addition, prior to Secretarial approval of any such appointment, actions must be taken to ensure that:

a. full consideration, in accordance with placement and promotion procedures of the department concerned, was given to eligible career employees;

b. when selection is by other than certification from an established civil service register, the vacancy has been publicized to give interested candidates an opportunity to apply;

c. qualification requirements for the position have not been written in a manner designed to give advantage to the former member; and

d. the position has not been held open pending the retirement of the former member.<sup>73</sup>

3. The above statute has been implemented in the Department of Defense by DODDIR 1402.1 of January 21, 1982, Employment of Retired Members of the Armed Forces. Under this directive, the Secretary may not approve such an appointment unless the appointment is to a position for which:

a. equally well-qualified personnel are not available among those required to be considered under applicable in-service placement and promotion procedures;

b. employee candidates are not available among those required to be considered in priority placement programs or among those on applicable reemployment priority lists or under the OPM Displaced Employee Program; and

c. intensive external recruitment efforts have failed to produce any better qualified candidates.

4. In the Navy, the hiring activity or servicing personnel office prepare the waiver requests. The approval authority for waivers for positions GS-8 or higher rests within the Office of the Assistant Secretary of the Navy for Manpower and Reserve Affairs (Director, Program Development and Direction Division, Deputy Assistant Secretary of the Navy, Civilian Personnel Policy/Equal Employment Opportunity). For positions GS-7 and below, requests may be approved by regional personnel offices. Nonappropriated fund activities have authority to approve their own requests.

#### C. Endnotes

1. See 5 U.S.C.A. §§ 8344, 8468 (West Supp. 1996).

2. The chronological development of dual compensation laws is as follows:

a. Dual Employment Act of 1894, ch. 174, § 2, 28 Stat. 162, 205 (repealed 1964);

b. Economy Act of 1932, ch. 314, § 212, 47 Stat. 382, 406 (repealed 1964); and

c. Dual Compensation Act of 1964, Pub. L. No. 88-448, 78 Stat. 484, amended by Civil Service Reform Act of 1978, Pub. L. No. 95-454, § 308, 92 Stat. 1111, 1149 (codified as amended at 5 U.S.C.A. §§ 5531-5533 (West 1980 & Supp. 1996)).

3. 5 U.S.C.A. § 5532(b) (West 1996).

4. The amount payable to employees at level V of the Executive Schedule is currently limited to \$108,200; the Office of Personnel Management revises the rate periodically. See Adjustment of Certain Rates of Pay and Allowances, Exec. Order No. 13,033, 61 Fed. Reg. 68,987 (1996).

5. Matter of: Lieutenant Colonel Merland Bersch, USAF, Retired, Comp. Gen. B-236258 (Mar. 14, 1990).

6. 5 U.S.C.A. § 5532(c).

7. Matter of: Captain Milton D. Beach, USN, Retired--Reconsideration, 70 Comp. Gen. 641 (1991).

8. Matter of: Lieutenant Colonel Robert C. McFarlane, USMC (Retired), 61 Comp. Gen. 221 (1982).

9. 37 U.S.C.A. § 101(11) (West 1988).
10. Clark v. United States, 281 F.2d 443 (Ct. Cl. 1960).
11. Matter of: Captain Virgil W. Whitehead, USMC (Retired)--Request for Waiver, Comp. Gen. B-238128 (Mar. 8, 1991).
12. To the Secretary of Defense, 44 Comp. Gen. 297 (1964).
13. Clark v. United States, 281 F.2d 443 (Ct.Cl. 1960).
14. To the Secretary of Defense, 44 Comp. Gen. 297 (1964).
15. 5 U.S.C.A. § 5531(2) (West 1996). The definition of "position" in § 5531(2) takes precedence over the narrower definition of "civil service" found in 5 U.S.C.A. § 2101(1). Matter of: Commander John D. Adams, USCG, Retired, Comp. Gen. B-257717 (Jan. 25, 1995).
16. S. Rep. No. 935, Title I, (1964) reprinted in 1964 U.S.C.C.A.N. 2834, 2837; see Denkler v. United States, 782 F.2d 1003 (Fed. Cir. 1986).
17. Matter of: Colonel Jimmy C. Hicks, USAF (Retired); Lieutenant Colonel Claude V. Hall, Jr., USA (Retired)--Dual Compensation Restrictions, Comp. Gen. B-238303 (May 29, 1991); Matter of: Captain Jack R. Griffin, USN (retired) and Commander Francis M. Kirk, USN (retired), Comp. Gen. B-236979 (Apr. 19, 1990).
18. Matter of: Captain Jack R. Griffin, USN (retired) and Commander Francis M. Kirk, USN (retired), Comp. Gen. B-236979 (Apr. 19, 1990).
19. To the Secretary of Labor, 42 Comp. Gen. 395 (1963); Acting Comptroller General Yates to Federal Security Administrator, 28 Comp. Gen. 50 (1948).
20. Matter of: Major William R. Minton, et al., USAF (Retired), Comp. Gen. B-237117 (July 12, 1991).
21. Matter of: Applicability of the Dual Compensation Act to the Head Basketball Coach, United States Military Academy, Comp. Gen. B-200240 (May 5, 1981).
22. In the Matter of Retired Pay, U.S. Navy, 54 Comp. Gen. 518 (1974); see also To Major George Opacic, United States Marine Corps, 45 Comp. Gen. 289 (1965) (reaching same conclusion with regard to Marine Corps Association).
23. 18 U.S.C. § 3006A (West 1985 & Supp. 1996).
24. To the Chairman, United States Civil Service Commission, 44 Comp. Gen. 605 (1965).
25. To the Secretary of Defense, 36 Comp. Gen. 309 (1956).
26. Comptroller General Warren to the Administrator of Veterans' Affairs, 26 Comp. Gen. 501 (1947).
27. To the Secretary of the Army, 45 Comp. Gen. 81 (1965).
28. To Lieutenant Colonel J.J. Vanya, Department of the Air Force, 45 Comp. Gen. 757 (1966).
29. DODINST 6025.5 of Jan. 6, 1995, Personal Services Contracts for Health Care Providers.

30. Matter of: Military Retirees--Employment Under Contract--Dual Compensation Restrictions, Comp. Gen. B-231565 (Nov. 14, 1988); Matter of: Major William R. Minton, et al., USAF (Retired), Comp. Gen. B-237117 (July 12, 1991).
31. To the Secretary of the Army, Comp. Gen. B-158148 (Feb. 9, 1966).
32. Denkler v. United States, 782 F.2d 1003 (Fed. Cir. 1986).
33. To Major George Opacic, United States Marine Corps, 45 Comp. Gen. 289 (1965).
34. To Lieutenant Commander Garland Casey, 47 Comp. Gen. 185 (1967).
35. To the Secretary of the Army, 50 Comp. Gen. 604 (1971).
36. 5 U.S.C.A. § 5532(d)(1)(A)-(B) (West 1996).
37. Sode v. United States, 531 F.2d 531 (Ct. Cl. 1976).
38. SECNAVINST 1850.4C of Mar. 8, 1990, Department of the Navy Disability Evaluation Manual, Part G - Policies Concerning Combat-Related Injuries.
39. To Secretary of the Army, 48 Comp. Gen. 219 (1968); Acting Comptroller General Weitzel to Secretary of the Navy, 34 Comp. Gen. 72 (1954).
40. To Secretary of the Army, 50 Comp. Gen. 480 (1971).
41. 38 U.S.C.A. § 101(11) (West 1991).
42. See Matter of: Colonel Robert D. Slay, USMC (Retired), Comp. Gen. B-228790.2 (Mar. 1, 1991).
43. To Secretary of Defense, 44 Comp. Gen. 266 (1964).
44. 5 U.S.C.A. § 5532(d)(2) (West 1996).
45. Id.; see Matter of: Major John D. Harris, USMC (Retired), Comp. Gen. B-243864.2 (May 26, 1992).
46. Civil Service Commission FPM Letter 300-5 of Nov. 17, 1964; Matter of: Major William R. Minton, et al., USAF (Retired), Comp. Gen. B-237117 (July 12, 1991).
47. Civil Service Commission Bulletin 550-9 of Sept. 10, 1964.
48. Matter of: Carl J. Odekirk, USA (Retired), Comp. Gen. B-230370.2 (Feb. 28, 1992).
49. Matter of: Lieutenant Colonel Robert C. McFarlane, USMC (Retired), 61 Comp. Gen. 221 (1982).
50. 5 U.S.C.A. § 5532(g) (West 1996).
51. Id.
52. Reemployment of Military and Civilian Retirees to Meet Exceptional Employment Needs, 5 C.F.R. § 553.202 (1996).

53. Matter of: Dr. Donald J. Mauthe--Request for Waiver, Comp. Gen. B-235159 (Feb. 7, 1990).
54. Colonel Bruce R. Rauhe, USAF (Retired), Comp. Gen. B-244505 (Jan. 14, 1992); Matter of: Dr. Donald J. Mauthe--Request for Waiver, Comp. Gen. B-235159 (Feb. 7, 1990).
55. Matter of: Colonel Samuel L. Anzalone, USAF (Retired), Comp. Gen. B-241226 (May 14, 1991); Matter of: Admiral James D. Watkins, USN, (retired), Comp. Gen. B-235501 (June 23, 1989); Matter of: Colonel Leon K. Pfeiffer, USAF, Retired, Comp. Gen. B-236753 (Feb. 24, 1992); Matter of: Colonel Frederick F.Y. Pang, USAF, Retired, Comp. Gen. B-243002 (July 11, 1991); Matter of: Captain Gerald E. Green, USN (Retired)--Waiver Request, Comp. Gen. B-255699 (May 9, 1994); Matter of: LTC Robert E. Fitzgerald, USA (Retired), Comp. Gen. B-238761 (Mar. 1, 1991).
56. Major Robert D. Caskey (Retired), Comp. Gen. B-252523 (Aug. 27, 1993); Matter of: Colonel Elvin D. Isgrig, USAF, Retired, Comp. Gen. B-253839 (Dec. 20, 1993); Matter of: Clair H. Upton, Comp. Gen. B-252125 (July 20, 1993); Colonel Bruce R. Rauhe, USAF (Retired), Comp. Gen. B-244505 (Jan. 14, 1992).
57. Dual Compensation Act of 1964, Pub. L. No. 88-448, § 201(f), 78 Stat. 484, 485.
58. Id.
59. To Lieutenant Colonel J.J. Vanva, Department of the Air Force, 45 Comp. Gen. 194 (1965).
60. To Major C.C. Craig, Disbursing Officer, Retired Pay Section, Fiscal Division, Through Headquarters U.S. Marine Corps, Department of the Navy, Comp. Gen. B-161277 (July 7, 1967).
61. To C.C. Gordon, United States Coast Guard, 45 Comp. Gen. 846 (1966).
62. Civil Service Reform Act of 1978, Pub. L. No. 95-454, § 308(g), 92 Stat. 1111, 1151.
63. Id.
64. 5 U.S.C.A. § 5532(e) (West 1996).
65. 22 U.S.C.A. § 2584 (West 1990).
66. 24 U.S.C.A. § 417(e)(3) (West Supp. 1996).
67. Id. § 421(b).
68. 10 U.S.C.A. § 2113(f)(2) (West Supp. 1996).
69. 20 U.S.C.A. § 4512(a)(4) (West Supp. 1996).
70. 5 U.S.C.A. § 5532(f) (West 1996).
71. Id. § 5534a.
72. Matter of: HUD Employees--Severance Pay--Retroactive Reduction-in-Force, 62 Comp. Gen. 435 (1983).
73. 5 U.S.C.A. § 3326(c).



#### IV. PRIVATE EMPLOYMENT RESTRICTIONS

**A. Introduction.** The body of law that restricts the employment of former government officials with private concerns has been significantly simplified in recent years. In early 1996, Congress repealed 10 U.S.C. § 2397, which barred the receipt of compensation from specific defense contractors by certain former DOD personnel for 2 years after separation. In addition, Congress also repealed the "anti-selling" restrictions.<sup>1</sup> This chapter discusses the remaining provisions. The Procurement Integrity Act bars certain agency officers who were involved in large procurements from working for certain DOD contractors for one year. Section 207, title 18, United States Code prohibits all Government employees (except enlisted personnel) from engaging in certain advocacy roles.

#### **B. Procurement Integrity Act**

1. **Applicability.** In 1996, Congress significantly amended the Procurement Integrity Act. The revised Procurement Integrity Act applies to employees who retire on or after January 1, 1997, and performed, on or after January 1, 1997, one of the acts that trigger the restrictions. Thus, the Procurement Integrity Act does not restrict the employment options of an employee who retired after January 1, 1997, if they did not perform procurement functions after that date. The provisions of the old Procurement Integrity Act continue to apply to employees who retired prior to January 1, 1997.<sup>2</sup> Personnel who retired prior to that date should consult the Appendix to this booklet, which reprints portions of the discussion of the old Procurement Integrity Act from the November 1992 version of this booklet.

#### 2. Employment restrictions

a. Under the revised Procurement Integrity Act and implementing regulations, a former Federal official is barred from accepting compensation from a contractor as an employee, officer, director, or consultant, for 1 year after he:

(1) served, at the time of selection or contract award, as procuring contracting officer (PCO), source selection authority (or source selection evaluation board member), or the chief of a financial or technical evaluation team in a procurement in which that contractor was selected for award of a contract in excess of \$10 million;

(2) served as the program manager, deputy program manager, or administrative contracting officer (ACO) for a contract in excess of \$10 million involving that contractor; or

(3) personally made a decision to award a contract, subcontract, modification, or task or delivery order in excess of \$10 million to that contractor; establish overhead or other rates applicable to a contract or contracts for that contractor in excess of \$10 million; approve issuance of a contract or payments in excess of \$10 million to that contractor; or pay or settle a claim in excess of \$10 million for that contractor.

b. "In excess of \$10 million" means:

(1) the value, or estimated value, at the time of award, of the contract, including all options;

(2) the total estimated value at the time of award of all orders under an indefinite-delivery, indefinite quantity, or requirements contract;

(3) any multiple award schedule contract unless the contracting officer documents a lower estimate;

(4) the value of a delivery order, task order, or an order under a Basic Ordering Agreement;

(5) the amount paid or to be paid in settlement of a claim; or

(6) the estimated monetary value of negotiated overhead or other rates when applied to the Government portion of the applicable allocation base.

c. As an exception to the above rule, a former Federal official may accept compensation from a division or affiliate of the prohibited contractor if the division or affiliate does not produce the same products or services as the entity of the contractor that is responsible for the contract in issue.

3. Penalties. An individual who violates the above employment restriction may be fined up to \$50,000 plus twice the compensation received or offered for the prohibited conduct. Organizations that employ an individual in violation of the above restrictions may be fined up to \$500,000 plus twice the compensation received or offered.<sup>3</sup>

#### 4. Examples

a. A retired Marine Corps colonel served as a program manager on a particular ordnance procurement five years before he retired. He wishes to work for the company that was awarded the contract in a job unrelated to the old contract. He may do so, since his service as program manager terminated more than 1 year ago.

b. A warrant officer recently served as a member of a source selection evaluation board on a contract worth \$8 million. Company X was a bidder in the procurement. Under the Procurement Integrity Act, the warrant officer may work for X Company because the contract was worth less than \$10 million. However, the warrant officer should ensure that he or she does not violate 18 U.S.C. § 207, discussed below.

c. A Navy captain recently served as a program manager for a certain aircraft procurement which involved Company X. The captain wishes to work for Company Y, which is an automobile parts subsidiary of Company X. Since the subsidiary does not manufacture aviation products, the captain may accept employment.

#### 5. Advice from ethics counselors<sup>4</sup>

a. An official or former official of a Federal agency who does not know whether he is precluded from accepting employment under the Act may request advice from an ethics counselor. Provided full disclosure of all relevant facts is made, a current or former official's good faith reliance on an ethics counselor's opinion will protect him against claims that he knowingly violated the Act. A request for an opinion should be in writing, dated and signed, and must include:

(1) all information reasonably available to the official or former official that is relevant to the inquiry (at a minimum, the request shall include information about relevant procurements in which the individual was involved, including contract or solicitation numbers, dates of solicitation or award, and a description of the goods or services procured or to be procured);

(2) information about the individual's participation in procurement decisions, including the dates or time periods of the participation, and the nature of the individual's duties, responsibilities, or actions; and

(3) information about the contractor who would be a party to the proposed conduct, including a description of the products or services produced by the contractor, or its division or affiliate from whom the individual proposes to accept compensation.

b. An ethics counselor may request additional information from the official, from other procurement officials, or the official's supervisor. The ethics counselor is required to issue an opinion within 30 days or as

soon thereafter as practicable. When the requester knows or should know that the opinion is based on fraudulent or misleading information, reliance on the opinion will not be deemed to be in good faith.

### **C. Communications and appearances with the intent to influence the Government**

#### **1. Background**

a. Since its enactment in 1962, 18 U.S.C. § 207 has been one of the primary sources of post-Government service employment restrictions applicable to officers and employees of the Executive Branch. It was designed to curb the "switching of sides" that occurs when a Government officer leaves Government service and then chooses to represent another person or entity on, or engage in, certain matters of interest to the Government. Although the statute does not prohibit the acceptance of any job in the private sector, it does restrict the scope of activities that can be undertaken on behalf of a private employer. The specific nature of the various prohibitions depends upon whether the former officer or employee left DON service prior to January 1, 1991, the degree of involvement in the particular matter while in Government service, and whether the former officer or employee was one of a specified group of high-ranking officials known as "senior employees."

b. Section 207 does not apply to former enlisted members.<sup>5</sup> It does apply to former Regular officers and civilian employees. The restrictions applicable to all former civilian employees and military officers, discussed in paragraph 2 below, also apply to some Reserve officers and special Government employees.<sup>6</sup> Specifically, the 1-year restrictions discussed in paragraph 3 below apply only to (1) a Reserve flag officer after he has served 60 days or more on voluntary active duty, active duty for training, involuntary active duty, or any combination of such duty during his last 365 days of service, or (2) a high-ranking special Government employee (*i.e.*, one appointed to an Executive Schedule position or receiving pay equal to, or greater than, level V of the Executive Schedule) after he was retained, designated, appointed, or employed to perform duties, with or without compensation, for 60 days or more during his last year of Government service.<sup>7</sup> A Reserve flag officer or high-ranking special Government employee should consult an ethics counselor for further guidance.

c. Since 1962, § 207 has been amended several times by Congress. One significant amendment became effective on July 1, 1979,<sup>8</sup> and another on January 1, 1991.<sup>9</sup> Personnel who retired or separated from Government service before January 1, 1991, are subject to the restrictions in effect at the time that they left Government service. For further information on the pre-1991 versions of this statute, consult your ethics counselor or review the prior editions of this Reference Guide.

2. Restrictions applicable to all former civilian employees and military officers who leave Government service on or after January 1, 1991. Three restrictions apply to all former officers, employees, and senior employees.

a. Lifetime restriction. Subsection 207(a)(1) prohibits former officers and employees from knowingly making, with the intent to influence, any communication to, or appearance before, any officer or employee of any department, agency, court, or court-martial, of the United States on behalf of any other person (except the United States) in connection with a particular matter involving a specific party or parties in which they participated personally and substantially while in Government service. This prohibition lasts for the life of the former officer or employee and commences upon his or her termination from Government service. The focus of this prohibition is on the former officer or employee who participated in a matter while employed by the Government and who later "switches sides" by representing another person on the same matter before the United States. This section of the statute does not, however, restrict a former official from providing "behind-the-scenes" or "in-house" assistance to a private employer. This prohibition also does not apply to communications to, or appearance before, Members of Congress or their legislative staffs.

(1) A violation of this prohibition occurs when the following four criteria are met:

(a) the former employee must have worked on a particular matter while in Government service;

(b) the scope of the former employee's work must have amounted to "personal and substantial" participation in that matter;

(c) a specific party to the particular matter must have been identified at the time of that Government work; and

(d) the former employee must, with the intent to influence, communicate with, or appear before, an officer or employee of the Federal Government on behalf of another person or entity regarding that same particular matter.

(2) These criteria are discussed in the following paragraphs:

(a) A "particular matter" covered by this proscription includes any specific contract, application, request for a ruling or other determination, rulemaking, claim, controversy, investigation, charge, accusation, arrest, or judicial or other proceeding.<sup>10</sup> Not included are the formulation of general policy, or other actions of general applicability in which the former officer or employee was involved unless the outcome may have a direct and predictable effect on a particular person. Thus, in most instances, a former officer or employee may represent a private employer in connection with a matter involving a specific application of policies that he helped formulate. The prohibition does not arise unless the former employee is working on the same particular matter that he worked on while in Government service. Factors to be considered in determining whether two particular matters are the same include the extent to which the matters involve the same basic facts, the same or related issues, the same or related parties, the same confidential information, the continuing existence of an important Federal interest, as well as the time elapsed between the two matters.

(b) The prohibition does not arise unless the former official's participation in the matter was "personal and substantial."<sup>11</sup> Personal and substantial participation can be exercised "through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or other such action."<sup>12</sup> Personal participation refers to both the former employee's actions and those of a subordinate when actually directed by the former employee. Substantial participation means involvement that is, or reasonably appears to be, significant to the matter. Mere official responsibility over a matter, knowledge of it, or perfunctory involvement on an administrative or peripheral issue does not amount to substantial participation. Participating in a single critical step, however, may be "substantial." Although participation generally requires some form of action, a former officer's inaction may be regarded as substantial participation if such inaction could cause a result to be different.

(c) The prohibition does not arise unless a specific party to the particular matter is identified at the time of the Government work.<sup>13</sup> A specific party is an identified non-Government entity. For example, a draft request for contract proposals will become a particular matter involving a specific party or parties once potential contractors are identified. For § 207(a)(1) to apply, however, the former official's employer does not need to have been identified as a party to the matter prior to his departure from Government service. So long as some specific party (or parties) was identified, the statute applies.

(d) The Office of Government Ethics has provided the following guidance on the nature of the communications and appearances prohibited by this section:

A former employee is not prohibited by this restriction from providing "behind-the-scenes" assistance in connection with the representation of another person. Moreover, the restriction prohibits only those communications and appearances that are made "with the intent to influence." A "communication" can be made orally, in writing, or through electronic transmission. An "appearance" extends to a former employee's mere physical presence at a

proceeding when the circumstances make it clear that his attendance is intended to influence the United States. An "intent to influence" the United States may be found if the communication or appearance is made for the purpose of seeking a discretionary Government ruling, benefit, approval, or other action, or is made for the purpose of influencing Government action in connection with a matter which the former employee knows involves an appreciable element of dispute concerning the particular Government action to be taken. Accordingly, the prohibition does not apply to an appearance or communication involving purely social contacts, a request for publicly available documents, or a request for purely factual information or the supplying of such information.<sup>14</sup>

b. Two-year restriction. The second restriction is identical to the lifetime restriction discussed above except that it is of shorter duration, and applies only if an officer or employee had official responsibility over the matter and did not participate personally and substantially in that matter. For 2 years after terminating Government service, § 207(a)(2) prohibits former officers or employees from making, with the intent to influence, any communication to, or appearance before, Government officials in connection with a particular matter involving a specific party or parties that came under their official responsibility during their last year of Government service. The term "official responsibility" is defined as "direct administrative or operating authority, whether intermediate or final, and either exercisable alone or with others, and either personally or through subordinates, to approve, disapprove, or otherwise direct Government actions."<sup>15</sup> "Administrative authority" means authority for planning, organizing, or controlling matters rather than authority to review or make decisions on ancillary aspects of a matter.<sup>16</sup> The scope of an officer's official responsibility is ordinarily determined by those areas assigned by statute, regulation, Executive Order, job description, or delegation of authority.<sup>17</sup> The Office of Government Ethics has determined that all particular matters under consideration in an agency are under the official responsibility of the agency head, and each is under that of any intermediate supervisor having responsibility for an official who actually participates in the matter within the scope of his or her duties.<sup>18</sup> "Actually pending" means that the matter was in fact referred to, or under consideration by, persons within the former official's area of responsibility, not that the matter merely could have been referred.<sup>19</sup> This prohibition does not restrict in-house assistance to an employer. Former employees are not subject to this restriction, unless at the time of the proposed representation of another they know or reasonably should know that the matter had been under their official responsibility during their last year of Government service.

c. Trade or treaty negotiations. For 1 year after terminating Government service, subsection 207(b) prohibits former officers and employees from knowingly representing, aiding or advising an employer or any entity regarding ongoing trade or treaty negotiations based on information that they had access to and that is exempt from disclosure under the Freedom of Information Act. This restriction begins upon separating or retiring from Government service and, unlike the restrictions of provisions of § 207(a)(1) or (2) discussed above, prohibits former officials from providing "behind-the-scenes" assistance on the basis of the covered information to any person or entity. This restriction applies only if the former official was personally and substantially involved in ongoing trade or treaty negotiations within the last year of his Government service. It is not necessary that the former official have had contact with foreign parties in order to have participated personally and substantially in a trade or treaty negotiation. The treaty negotiations covered by this section are those that result in international agreements that require the advice and consent of the Senate.<sup>20</sup> The trade negotiations covered are those that the President undertakes under section 1102 of the Omnibus Trade and Competitiveness Act of 1988.<sup>21</sup> A negotiation becomes "ongoing" at the point when both (1) the determination has been made by competent authority that the outcome of the negotiation will be a treaty or trade agreement, and (2) discussions with a foreign government have begun on a text.

3. Restrictions applicable to former senior employees who leave Government service on or after January 1, 1991. In addition to the restrictions described above, "former senior employees" are subject to two additional restrictions. To facilitate discussion, the term "former senior employee" includes all former general and flag officers (pay grade O-7 or above) and civilian employees who were employed in a position for which the rate of

pay is specified in or fixed in accordance with the Executive Schedule, or in a position for which the rate of pay is equal to or greater than the rate of pay payable for level V of the Executive Schedule.<sup>22</sup>

a. One-year restriction on communicating with former department, agency, or component. For 1 year after serving in such a position, former senior employees are prohibited by virtue of § 207(c) from knowingly making, with the intent to influence, any communication to, or appearance before, an employee of the department, agency or designated component in which they served during their last year of Government service, if that communication or appearance is made on behalf of any other person seeking official action on a matter.

(1) Purpose. This 1-year "cooling off" period is to allow for a period of adjustment to new roles for the former senior employee and the agency he served, and to diminish any appearances that Government decisions might be affected by the improper use by an individual of his former senior position.

(2) Scope of restriction. This 1-year restriction is measured from the date an employee ceases to be a senior employee, not from the termination of Government service, unless the two occur simultaneously. Like the restrictions of § 207(a)(1) and § 207(a)(2) discussed above, this restriction prohibits communications to, and appearances before, the Government but does not prohibit "behind-the-scenes" assistance. This prohibition differs from the restrictions discussed above in several important respects:

(a) the former senior employee need not have had any prior involvement in, or responsibility over, the matter;

(b) the matters covered are broader and need not involve specific parties; and

(c) it is limited to contact with the department or agency in which the former senior employee served during his or her last year of Government service and does not extend Government-wide.

There are specific exceptions to this 1-year bar which are discussed below.

(3) Separate DOD components. For purposes of § 207(c), the Department of the Defense is divided into a parent department and various components. As of this time, the designated DOD components are the Departments of the Navy, Army, and Air Force, Defense Communications Agency, Defense Intelligence Agency, Defense Logistics Agency, Defense Mapping Agency, Defense Nuclear Agency, and National Security Agency.<sup>23</sup> Subject to the rule for detailees, below, a former employee of any of these components is not barred from making communications to the other designated components.

(a) Employment with OSD. The implementing regulation<sup>24</sup> provides:

An eligible former senior employee who served in a "parent" department or agency is not barred by 18 U.S.C. 207(c) from making communications or appearances before any employee of any designated component of that parent, but is barred as to employees of the parent and of other components that have not been designated.

For example, a former senior civilian employee who only served in OSD during his last years of Government service, is barred from making communications to OSD, but not to the Army, Air Force, Navy or any other designated component. However, under the detailees provision discussed below, a uniformed officer who was detailed to OSD during his or her last year is barred from making communications to OSD as well as his uniformed service component, but may communicate with other designated components.

(b) Employment with a component. The regulation further provides:

An eligible former senior employee who served in a designated component of a parent department or agency is barred from communicating to or making an appearance before any employee of that component, but is not barred as to any employee of the parent or of any other component.

A flag officer who did not serve with OSD during his final year of service, is not barred by § 207(c) from making communications to OSD.

(c) Detailees. Under 18 U.S.C. § 207(g), an officer or employee who is detailed from one department to another, shall, during the period so detailed, be deemed to be an officer or employee of both departments. Thus, a senior naval officer assigned to OSD during his final year of government service will be barred by § 207(c) from making communications to both the Department of the Navy and OSD.

b. One-year restriction on representing a foreign entity. For 1 year after serving in such a position, a former senior employee is prohibited by virtue of § 207(f) from knowingly representing, aiding, or advising a foreign entity with the intent of influencing an officer or employee of the U.S. Government in carrying out his official duties. This 1-year restriction is measured from the date an employee ceases to be a senior employee, not from the termination of Government service, unless the two occur simultaneously. For the purpose of this subsection, a "foreign entity" includes the government of a foreign country and any person or group of persons exercising sovereign political jurisdiction over any country or any part of a country.<sup>25</sup> The term also includes foreign political parties and any organization or group of individuals engaged in, or seeking to engage in, the establishment, administration, or control of a foreign country or government.<sup>26</sup> A foreign commercial corporation will not generally be considered a "foreign entity" for purposes of § 207(f) unless it exercises the function of a sovereign. A former senior employee "represents" a foreign entity when he acts as an agent or attorney for, or otherwise communicates or makes appearances on behalf of, that entity to or before any employee of a Government department or agency. A former senior employee "aids" or "advises" a foreign entity when he assists the entity other than by making the communication or appearance. Such "behind-the-scenes" assistance to a foreign entity could, for example, include drafting a proposed communication to an agency, advising on an appearance before a department, or consulting on other strategies designed to persuade departmental or agency decisionmakers to take a certain action. A former senior employee's representation, aid, or advice is only prohibited if made or rendered with the intent to influence an official discretionary decision of a current departmental or agency employee.

4. Exceptions. The restrictions of § 207 contain several exceptions. If an exception applies, a former member or employee is permitted to communicate with the Government, but only to the extent of the applicable exception.

a. Exception for scientific or technological information<sup>27</sup>

(1) In General. Section 207 provides an exception from its provisions for communications made solely for the purpose of furnishing scientific or technological information. Such communications do not constitute an intent to influence. This exemption applies to all of the limitations on communications discussed above except § 207(b), i.e., restrictions on trade and treaty negotiations, and § 207(f), i.e., restrictions on former senior employees representing, aiding, and advising foreign entities. The exemption is found in 18 U.S.C. § 207(j)(5). The current law provides two methods to fit within the exemption. Both are designed to allow the free exchange of scientific and technological information, and are available to all former personnel regardless of whether they are subject to the provisions of prior or current law.

(2) Certificate of exemption. A former officer or employee may be excepted from the above provision by the head of an agency. In order to obtain an exemption under this method, the head of the agency concerned, in consultation with the Director, Office of Government Ethics, must execute and publish in the Federal Register a certification of exemption stating that:

(a) the individual concerned has outstanding qualifications in a scientific, technological, or other technical discipline;

(b) the individual concerned is acting with respect to a particular matter that requires such qualifications; and

(c) the national interest would be served by the individual's participation.

As a general rule, this method of exception has been limited to those former personnel whose services are needed on a continuing and comprehensive basis.<sup>28</sup>

(3) Individual agency procedures. A second method of obtaining this exception is available to former DON personnel who either have no need, or are unable to qualify for, the certificate of exception discussed in the preceding paragraph. To qualify for this exemption, employees may provide scientific or technological information under procedures acceptable to the agency concerned. Each agency has the primary responsibility for developing its own procedures. Procedures vary among different agencies to conform to the particular characteristics and needs of each. It is important, therefore, for former personnel utilizing this method of exception to comply fully with the regulations issued by the agency with which he desires to communicate.

b. Official Government duties. The restrictions in § 207 do not apply to communications made on behalf of the United States in performing official Government duties or performing duties as an elected official of a State or local government.<sup>29</sup> Under this restriction, for example, a retired commanding officer or reporting senior may modify evaluations and fitness reports on former subordinates in accordance with applicable regulations without violating this section.

c. Former senior employees exceptions. Three specific exceptions apply to § 207(c). These exceptions do not apply to § 207(f) or the other subsections discussed above.

(1) Special knowledge. This exception provides that the restriction in § 207(c) does not apply to a former senior employee who makes a statement, which is based on his own special knowledge in the particular area that is the subject of the statement, if no compensation is thereby received.<sup>30</sup>

(2) State and local governments and institutions, hospitals and organizations. The restriction in § 207(c) does not apply to appearances, communications, or representation by a former senior employee who is an employee of a state or local government, an employee of certain accredited degree-granting institutions of higher education, or an employee of a nonprofit, tax-exempt hospital or a medical research institution if the appearance, communication, or representation is on behalf of such government, institution, hospital, or organization.<sup>31</sup>

(3) Political parties and campaign committees. Section 207(c) does not apply to communications made solely on behalf of a candidate in his capacity as a candidate, an authorized committee, a national committee, a national Federal campaign committee, a State committee, or political party.<sup>32</sup>

d. Testimony. A former employee may give testimony under oath or make statements required to be made under penalty of perjury. Former personnel may give expert opinion testimony, however, only if given pursuant to a court order or if not otherwise subject to the lifetime bar (18 U.S.C. § 207(a)) discussed above as it relates to the subject matter of the testimony.<sup>33</sup>

e. Representing or assisting international organizations. The restrictions do not prohibit representing, aiding, or advising an international organization in which the Government participates, if the Secretary of State certifies in advance that such activity is in the Government's interest.<sup>34</sup>



**D. Use of inside information**

1. A former employee should remember that the Procurement Integrity Act prohibition against divulging certain procurement information discussed in Chapter II applies to former Government employees as well as current Government employees.

**E. Endnotes**

1. The Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, 108 Stat. 3243, repealed 37 U.S.C. § 801, the three-year civil selling restriction, and suspended, through 1996, 18 U.S.C. § 281, the criminal selling restriction. The National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, 110 Stat. 186 (1996), completely repealed 18 U.S.C. § 281.
2. Federal Acquisition Regulation, 62 Fed. Reg. 226, 227 (1997) (to be codified at 48 C.F.R. § 3.104-2).
3. National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, § 4304(a), 110 Stat. 186, 661 (to be codified at 41 U.S.C. § 423(e)(2)).
4. Federal Acquisition Regulation, 62 Fed. Reg. at 230 (to be codified at 48 C.F.R. § 3.104-7).
5. 18 U.S.C.A. § 202(a) (West Supp. 1996).
6. Id.
7. Id.; 18 U.S.C.A. § 207(c)(2), (f).
8. Ethics in Government Act of 1978, Pub. L. No. 95-521, § 501, 92 Stat. 1824, 1864-67, as amended by Ethics in Government Act of 1978, amendment, Pub. L. No. 96-28, § 2, 93 Stat. 76, 76-77 (1979).
9. Ethics Reform Act of 1989, Pub. L. No. 101-194, 103 Stat. 1716, as amended by Ethics Reform Act of 1989: Technical Amendments, Pub. L. No. 101-280, 104 Stat. 149 (1990).
10. 18 U.S.C.A. § 207(i)(3) (West Supp. 1996).
11. Regulations Concerning Post Employment Conflict of Interest, 5 C.F.R. § 2637.201 (1996).
12. 18 U.S.C.A. § 207(i)(2).
13. 5 C.F.R. § 2637.201(c)(4).
14. Director, U.S. Office of Government Ethics Memorandum of Oct. 26, 1990, Revised Post-Government Restrictions of 18 U.S.C. § 207.
15. 18 U.S.C.A. § 202(b) (West 1996).
16. 5 C.F.R. § 2637.202(b)(2).
17. Id.
18. Memorandum, supra note 14.

19. 5 C.F.R. § 2637.203(c).
20. 18 U.S.C.A. § 207(b)(2)(B).
21. Id. § 207(b)(2)(A).
22. Id. § 207(c)(2).
23. Agency Components for Purposes of 18 U.S.C. § 207(c), 5 C.F.R. § 2641 App. B (1996).
24. Post-Employment Conflict of Interest Restrictions, 5 C.F.R. § 2641.201(e)(1) (1996).
25. 18 U.S.C.A. § 207(f)(2) (West Supp. 1996).
26. Id.
27. Id. § 207(j)(5).
28. Regulations Concerning Post Employment Conflict of Interest, 5 C.F.R. § 2637.206 (1996).
29. 18 U.S.C.A. § 207(j)(1).
30. Id. § 207(j)(4).
31. Id. § 207(j)(2).
32. Id. § 207(j)(7).
33. Id. § 207(j)(6). See SECNAVINST 5820.8A, August 27, 1991, Release of Official Information for Litigation Purposes and Testimony by Department of the Navy Personnel, for further guidance regarding giving expert testimony.
34. Id. § 207(j)(3).

## V. FOREIGN EMPLOYMENT RESTRICTIONS

**A. Employment with foreign governments and foreign principals.** The primary restriction on the foreign employment of retired personnel is found in article I, section 9, clause 8, of the United States Constitution. This provision prohibits any person holding any office of profit or trust under the Federal Government from accepting any present, emolument, office, or title of any kind from any king, prince, or foreign state without the consent of Congress.

1. **Applicability.** This provision prohibits employment of all retired military personnel, officer and enlisted, Regular and Reserve,<sup>1</sup> as well as Fleet Reservists, by a foreign government unless congressional consent is first granted.<sup>2</sup>

a. **Employment by institutions controlled by foreign governments.** Employment by educational or commercial institutions owned, operated, or controlled by a foreign government is also prohibited.<sup>3</sup> For example, a retired officer hired by an American company under contract to provide training services to a foreign government was held to be employed by a foreign government when the government had the authority, pursuant to the contract, to discharge the officer and to supervise and direct his activities.<sup>4</sup> Employment by corporations which have a unity of interest and ownership with a foreign government is also included within the scope of this restriction.<sup>5</sup> If a corporation maintains a separate identity and is not a mere agent or instrumentality of the foreign government, then employment is permissible without obtaining congressional consent.<sup>6</sup>

2. **Penalty.** While this Constitutional proscription has no penalty for violation, the Comptroller General has ruled that it could be given "substantial effect" by withholding the member's retired pay in an amount equal to the foreign salary illegally received. However, once the questioned employment is approved, withholding of retired pay will be discontinued except to the extent necessary to recoup any retired pay paid during the unauthorized employment.<sup>7</sup>

3. **Obtaining Congressional consent.** Where Congressional consent is obtained, no violation of the Constitution occurs. Congress has provided statutory consent, subject to approval by the Secretary of State and the Secretary of the Navy, for two types of employment by a foreign government.

a. **Civil employment.** Congress has consented to the acceptance of civil employment with a foreign government by retired members of the uniformed services and members of Reserve components of the armed forces.<sup>8</sup>

b. **Military employment.** By separate statute, Congress has consented to retired members of the armed forces to accepting employment by, or holding an office or position in, the military forces of a newly democratic nation.<sup>9</sup> Unlike the civil employment provision, this statute does not extend consent to non-retired Reservists. The Secretary of State and the Secretary of the Navy jointly determine whether a nation is newly democratic for purposes of this statute.

c. **Procedures.** Under both statutes, approval is required by the Secretary of State and the Secretary of the Navy. Foreign employment should not be accepted until approval is obtained since approval is prospective only.<sup>10</sup> A retired Navy member who wishes to accept such employment should submit a written request for approval to the Bureau of Naval Personnel, Office of Legal Counsel (Pers-06), Washington, DC 20370-5006. A retired Marine Corps member should write the Commandant of the Marine Corps, Headquarters, U.S. Marine Corps (Code JAR), Washington, DC 20380-0001. Each request should contain a full description of the contemplated employment and the nature and extent of the involvement of the foreign government. Members not included in the grant of congressional consent (*i.e.*, Regular members on the active list) who wish to accept employment with a foreign government may seek the necessary Congressional consent by initiating private legislation through their Federal representative.

4. **Foreign Agents Registration Act.** A former member desiring employment by a foreign government or any foreign business interest must also consider whether such employment would require registration as an agent of a foreign principal under the Foreign Agents Registration Act of 1938.<sup>11</sup> This Act requires anyone engaging in activities as an agent of a foreign principal to file a registration statement with the Attorney General. If such registration is required, there is some question whether a retired officer can become so employed without violating the criminal statute<sup>12</sup> that prohibits a "public official" of the United States from acting as an agent. The question of whether this prohibition applies to a retired officer depends upon whether such officer is considered to be a "public official." In an opinion of November 4, 1966, signed by the Assistant Attorney General, Internal Security Division, Department of Justice, it was stated that the 1966 version of the statute was apparently not intended to apply to a member of the uniformed services not on active duty, whether in a retired or Reserve status. Even though "officer or employee" in the 1966 statute was substituted for the term "public official" by the 1984 amendment, the opinion of the Justice Department regarding applicability of the new statute to retired officers has not changed. In a letter of January 19, 1988, the Chief, Registration Unit, Internal Security Division said the statute "was only intended to apply to active duty personnel."

**B. Representing a foreign government or political party.** Section 207(f) of title 18, United States Code, prohibits "senior employees" (including flag and general officers) from representing, aiding, or advising any foreign government or foreign political party before any department or agency of the United States within one year after serving in such a position. This prohibition is discussed in more detail in paragraph IVC3b above.

#### **C. Citizenship**

1. Loss of United States citizenship by retired officers and enlisted personnel generally results in the loss of retired pay.<sup>13</sup> Retired pay is contingent on one maintaining his military status.<sup>14</sup> The Comptroller General has held that loss of citizenship is "inconsistent" with a continuation of that status.<sup>15</sup>

2. The law of citizenship can be complex, and persons faced with citizenship issues should seek guidance from the Department of State or legal counsel. Citizenship can be lost by a variety of means. For example, one loses citizenship by voluntarily, with the intent to relinquish United States nationality, obtaining naturalization in a foreign state, or by taking an oath, making an affirmation or other formal declaration of allegiance to a foreign state, or, under certain circumstances, serving in the armed forces of a foreign country or in another post of a foreign government.<sup>16</sup> Such issues may arise when an individual seeks dual citizenship. As a general rule, merely residing in a foreign country does not cause one to lose United States citizenship.<sup>17</sup>

#### **D. Endnotes**

1. This restriction also applies to drilling Reservists since they hold an "Office of Profit or Trust" with the United States. The prohibition continues after the time a Reservist completes the requisite number of years to be eligible for retired pay and is transferred to inactive status, since a Reserve in this status continues to be subject to recall. 10 U.S.C.A. § 12735(c) (West Supp. 1996). There is some authority to suggest that once a Reservist begins to draw retired pay at age 60, he no longer holds an office under the United States. See To the Honorable Lawrence L. Lamade, General Counsel, Department of the Navy, Comp. Gen. B-236084 (Jul. 31, 1989).

2. To C.C. Gordon, United States Coast Guard, 44 Comp. Gen. 130 (1964); To the Secretary of the Navy, 44 Comp. Gen. 227 (1964).

3. To the Secretary of the Navy, Comp. Gen. B-152844 (Dec. 12, 1963); JAG ltr JAG:134:WEN:sb of Jan. 23, 1962.

4. Matter of: Major Stephen M. Hartnett, USMC (Retired)--Reconsideration--Suspension of Retired Pay--Employment by Foreign Government, 69 Comp. Gen. 175 (1990). See also Matter of Retired Marine Corps Officers, Comp.Gen. B-217096 (Mar. 11, 1985)(retired judge advocates who were members of a professional corporation which was retained by a component of the Saudi Arabian Government were considered to have received emoluments from a foreign state).
5. Matter of: Major Gilbert S. Sanders, U.S.A.F. (Retired) (Deceased)--Employment by a Foreign Government, Comp. Gen. B-231498 (June 21, 1989).
6. Matter of: Lieutenant Colonel Marvin S. Shaffer, USAF, Retired, 62 Comp. Gen. 432 (1983).
7. Matter of: Major Marvin L. Friedman, USAF, Retired, 61 Comp. Gen. 306 (1982); See Joseph P. Creekmore, Acceptance of Foreign Employment by Retired Military Personnel, 43 Mil. L. Rev. 111 (1969).
8. 37 U.S.C.A. § 908 (West Supp. 1996).
9. 10 U.S.C. § 1060 (West Supp. 1996).
10. In the Matter of Retired Uniformed Services Members Receiving Compensation from Foreign Governments, 58 Comp. Gen. 487 (1979); Matter of: Major Martin L. Kammerer, USAF, Retired, Comp. Gen. B-193562 (Dec. 4, 1979); Matter of: Major Stephen M. Hartnett, USMC (Retired)--Reconsideration--Suspension of Retired Pay--Employment by Foreign Government, 69 Comp. Gen. 175 (1990).
11. 22 U.S.C.A. §§ 611-21 (West 1990 & Supp. 1996).
12. 18 U.S.C.A. § 219(a) (West Supp. 1996).
13. See generally, DOD 7000.14-R of Nov. 15, 1992, DOD Financial Management Regulation, Volume 7B, Chapter 2.
14. To Commander R.A. Wilson, Department of the Navy, 38 Comp.Gen. 523 (1959).
15. To the Secretary of Defense, 41 Comp. Gen. 715 (1962); To the Secretary of the Navy, 44 Comp. Gen. 227 (1964). On the other hand, a retired alien enlisted member, even if he lives in a foreign country, generally does not lose his right to retired pay. DOD 7000.14-R of Nov. 15, 1992, DOD Financial Management Regulation, Volume 7B, Section 20204b.
16. 8 U.S.C.A. § 1481 (West 1970 & Supp. 1996).
17. Schneider v. Rusk, 377 U.S. 163 (1964).

## **VI. CONCLUSION**

The foregoing is a restatement of the laws that restrict the employment activities of officers, enlisted members, and civilian employees who leave DON service. Other statutes regulate the activities of officers serving on active duty, including retired officers recalled to active duty. No attempt has been made to catalogue or discuss related criminal statutes, such as those relating to bribery, graft, and corruption of public officials applicable to the activities of persons generally, including military personnel, active, inactive, and retired. It is impractical to attempt to list every statutory provision relating to this subject, and this pamphlet should not be considered a substitute for advice from an ethics counselor. This compilation is a general guide for the use of personnel contemplating employment after DON service. For any case not covered by this pamphlet or in unusual situations, the Judge Advocate General (Code 13), 200 Stovall Street, Alexandria, VA 22332-2400; the Office of the General Counsel, Assistant General Counsel (Ethics), Presidential Towers, 7th Floor, 2511 Jefferson Davis Highway, Arlington, VA 22209, or the Commandant of the Marine Corps, Headquarters, U.S. Marine Corps (Code JAR), Washington, DC 20380-0001, will assist you in determining the propriety of any activities in which you propose to engage upon retirement or separation. Additionally, you should consult with your local ethics counselor for an initial assessment of your post-Government service employment plans should you have questions about the propriety of such activities.

**VII. APPENDIX**  
**PROCUREMENT INTEGRITY ACT PROVISIONS APPLYING TO EMPLOYEES WHO**  
**RETIRED PRIOR TO 1 JANUARY 1997**

The Procurement Integrity Act was recently revised. The new provisions apply to personnel who retire on or after January 1, 1997, and are discussed in Chapter IV. The provisions of the old Procurement Integrity Act continue to apply to personnel who retired prior to January 1, 1997. The following is a discussion of the old Procurement Integrity Act reprinted from the November 1992 Reference Guide to Post-Government Service Employment Activities.

**A. Procurement Integrity Act**

1. Background. The "Procurement Integrity Act" (section 423 of title 41, United States Code) originally became law on July 16, 1989. Section 814 of Public Law 101-189, however, suspended this Act from November 1989 to December 1, 1990. The Department of Defense Authorization Act for 1991 further suspended, through May 31, 1991, the section of the law that restricts post-Government service activities of former officials who were procurement officials. On June 1, 1991, this section again became effective. Due to this suspension and the lapse of time from when the Act was originally in effect, only personnel who acted as procurement officials on or after June 1, 1991, and who retired prior to January 1, 1997, are subject to the original Act's post-Government employment restrictions.

2. Definitions. The following definitions are provided for the purposes of interpreting the Act.

a. Procurement official<sup>1</sup> means any civilian or military official (officer or enlisted) or employee of an agency who has participated personally and substantially in any of the following activities for a particular procurement --

- (1) drafting a specification or statement of work;
- (2) reviewing or approving a specification or statement of work;
- (3) preparing or developing a procurement or purchase request;
- (4) preparing or issuing a procurement solicitation;
- (5) evaluating bids or proposals;
- (6) selecting sources;
- (7) negotiating to establish the price or terms and conditions of a contract or contract modification; or
- (8) reviewing and approving the award of a contract or modification.

b. Personal and substantial.<sup>2</sup> To be a procurement official, your participation in the procurement must be "personal and substantial." If you participate "directly" in a procurement, you have participated "personally." If you direct the participation of subordinates, you are participating "personally." "Substantial" participation requires your involvement to be of significance to the matter. Your participation must be more than perfunctory and routine. For example, it must be more involved than merely reviewing a procurement to ensure compliance with administrative procedures or budgetary considerations. It is the significance of your participation that is most important, not the amount of time spent on a matter. If your participation on a procurement consumed a

large amount of time, but only concerned peripheral matters, than your participation may not be substantial. If your participation consisted of only several minutes of your time, but involved a decision that was critical to the procurement, then your participation could well be "personal and substantial," classifying you as a procurement official for that particular procurement.

c. During the conduct of any Federal agency procurement of property or services<sup>3</sup> is defined as the period beginning on the earliest date upon which an identifiable, specific action is taken for the particular procurement and concluding upon the award or modification of a contract or the cancellation of the procurement, provided, however, that in no event shall the conduct of the procurement be deemed to have begun prior to the decision by an authorized agency official to satisfy a specific agency need or requirement by procurement. These actions are --

- (1) drafting a specification or a statement of work;
- (2) review and approval of a specification;
- (3) requirements computation at an inventory control point;
- (4) development of procurement or purchase requests;
- (5) preparation or issuance of a solicitation;
- (6) evaluation of bids or proposals;
- (7) selection of sources;
- (8) conduct of negotiations; or
- (9) review and approval of the award of a contract or contract modification.

d. Modifications<sup>4</sup> to a contract are defined as the addition of new work to a contract or the extension of a contract that requires a justification and approval. A modification is considered a separate procurement action from the original procurement action which ended with the award of the original contract. If you were a procurement official for the purposes of the initial procurement action, you are not necessarily a procurement official for the modification unless you take personal and substantial action on the modification.

e. Competing contractor<sup>5</sup> with respect to any procurement (including any procurement using procedures other than competitive procedures) of property or services, means any entity that is, or is reasonably likely to become, a competitor for or recipient of a contract or subcontract under such procurement, and includes any other person acting on behalf of such an entity. During the initial stages of a procurement there will most likely be many companies considered potential competing contractors. After the announcement of the procurement by publication in the Commerce Business Daily, this category of companies will be narrowed. At this point, the most probable interpretation is that any company or its subcontractor that requested a copy of the agency's "Request for a Proposal" (RFP) is a competing contractor. After the date for submission of proposals, only the companies which submit offers or their subcontractors are competing contractors. After execution of the contract, "competing contractors" include the company or firm that won the award and certain significant subcontractors. With regard to modification of a contract, only the prime contractor and likely subcontractors would be the competing contractors. The term also includes, in the case of a contract modification, the incumbent contractor.

f. Proprietary information<sup>6</sup> means that contained in a bid or proposal submitted in response to a procurement request or as an unsolicited proposal and clearly marked.



g. Source selection information<sup>7</sup> is information prepared for Government use, the disclosure of which would jeopardize the integrity of the procurement to include: (1) bid prices or proposed costs or prices; (2) source selection plans; (3) technical evaluation plans; (4) technical evaluation of proposals; (5) costs or price evaluations; (6) competitive range determinations; (7) ranking of bids, proposals or competitors; (8) reports of source selection panels or boards; or (9) other information marked as "source selection information" based upon a case-by-case determination by the Head of the Contracting Activity, his or her designee, or the contracting officer.

### 3. Employment restrictions<sup>8</sup>

a. For a period of 2 years from the date a current or former Government official (see paragraph 4 below) last participated in a particular procurement as a procurement official, he is prohibited from either:

(1) subsequently participating in any manner as an employee, agent, representative, or consultant of a competing contractor in any negotiations leading to the award, modification, or extension of a contract for such procurement; or

(2) participating personally and substantially on behalf of the competing contractor in the performance of such contract.

b. Both restrictions extend to post-Government service activities on behalf of some subcontractors. They generally do not apply if the subcontract is less than \$100,000 or if participation is on behalf of a subcontractor below the second tier.<sup>9</sup> However, the restrictions apply regardless of dollar value at any tier if the particular subcontractor significantly assisted the prime contractor in negotiation of the prime contract, if the procurement official reviewed or approved the award of the subcontract, or if the procurement official recommended the particular subcontractor to the prime contractor as a source.<sup>10</sup>

c. A current or former procurement official who knowingly violates either of these restrictions may be fined in an amount not to exceed \$100,000.<sup>11</sup> A competing contractor who violates either restriction may be fined in an amount not to exceed \$1,000,000.<sup>12</sup>

4. Who is subject to the restrictions? Any military member or civilian employee of the Department of Defense who acted as a procurement official on or after June 1, 1991, and who retired prior to January 1, 1997, is subject to these restrictions. This includes Regular or Reserve officers, enlisted personnel, special Government employees, and employees of nonappropriated fund instrumentalities.<sup>13</sup>

5. Triggering the restrictions. These restrictions do not apply to Government personnel merely because of their titles, general official responsibilities, or their signing of Procurement Integrity Act certificates. Whether an individual acted as a procurement official for a given procurement depends on the extent to which he was involved in the contracting process and the timing of his involvement. To be subject to the restrictions in a particular procurement, a member or employee must become a "procurement official" by: (1) participating "personally and substantially" in one of the activities set forth in paragraph A2b, above, (2) "during the conduct of that particular procurement." See paragraph A2c. above, for a definition of the term "during the conduct of an agency procurement of property or services."

### 6. Scope of restrictions

a. The Procurement Integrity Act's post-Government service employment restrictions do not prohibit a former procurement official from obtaining employment with a competing contractor. These restrictions only limit a former official's involvement on a particular procurement in which he or she served as a procurement official. (The new Act, however, does bar certain employment).

b. The restriction against assisting competing contractors in any further negotiations on a particular procurement embraces "behind the scenes" or "in-house" advice -- even as a consultant -- as well as personal appearances before Government personnel. The key is that the advice must not be given for the specific purpose of "influencing" the contractor's negotiating strategies with the Government, including providing advice or information for such purposes.<sup>14</sup> "Negotiation strategies" means the contractor's approach to the preparation and presentation of its offer or the conduct of negotiations with the Government.<sup>15</sup> Through this distinction, the implementing regulation permits rendering "scientific, technical or other advice that is unrelated to negotiation strategies," leaving open the prospect of some general corporate participation in the subject under negotiation.<sup>16</sup>

c. The restriction on participating personally and substantially in a specific contract's performance prohibits "both direct and significant involvement" in that contract.<sup>17</sup> Excluded from this restriction is the performance of "general scientific or technical work, or providing general budgetary or policy advice."<sup>18</sup>

7. Release of procurement information. Former personnel are prohibited during the conduct of an agency procurement from knowingly disclosing any proprietary or source selection information to any person not authorized to receive it.<sup>19</sup> This prohibition continues after personnel leave Government service. A violation of this prohibition may result in the imposition of criminal penalties of 5 years confinement, a fine, or both.

#### 8. Examples

a. A warrant officer served as a procurement official on a contract for a management study and she separated from the Navy before the contract award was made. After her discharge, she entered into negotiations and took a job with Company A who submitted an offer under the request for proposals on which she worked. Can she help Company A draft its best and final offer? Or can she assist Company A in developing its negotiating strategy?

Answer: The answer to both questions is "no." The implementing regulation states that the restriction on participating in any manner in negotiations leading to award or modification of the contract includes "providing advice or information on negotiation strategies." And it defines negotiating strategies as the "contractor's approach to the preparation and presentation of its offer and conduct of negotiations with the Government."

b. A lieutenant participates in a working group to study the adequacy of a command's computer system and make appropriate recommendations. At the completion of the study, the group recommends that the system be upgraded through procurement of more advanced equipment. The recommendation is subsequently submitted to an official who determines that the command's need will be satisfied through a procurement and directs appropriate steps be initiated to procure such equipment. Has the lieutenant served as a procurement official?

Answer: No. Although the lieutenant may have participated personally and substantially in the working group, his involvement did not occur "during the conduct of an agency's procurement of property or services." The conduct of a procurement is not deemed to have begun prior to the decision by an authorized agency official to satisfy a specific agency need or requirement by procurement. Since his participation occurred before the conduct of the procurement began, the lieutenant is not a procurement official.

#### B. Endnotes

1. See 41 U.S.C.A. § 423(p)(3)(A) (West Supp. 1996) (amended by National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, § 4303, 110 Stat. 186, 659-65); Federal Acquisition Regulation, 48 C.F.R. § 3.104-4(h) (1995) (amended by 62 Fed. Reg. 226, 228-29 (1997)).

2. See 48 C.F.R. § 3.104-4(g) (1995) (amended by 62 Fed. Reg. 226, 228-29 (1997)).

3. See 41 U.S.C.A. § 423(p)(1) (West Supp. 1996) (amended by National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, § 4303, 110 Stat. 186, 659-65); 48 C.F.R. § 3.104-4(c) (1995) (amended by 62 Fed. Reg. 226, 228-29 (1997)).
4. 48 C.F.R. § 3.104-4(e) (1995) (amended by 62 Fed. Reg. 226, 228-29 (1997)).
5. 41 U.S.C.A. § 423(p)(2) (West Supp. 1996) (amended by National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, § 4303, 110 Stat. 186, 659-65); 48 C.F.R. § 3.104-4(b) (1995) (amended by 62 Fed. Reg. 226, 228-29 (1997)).
6. 48 C.F.R. § 3.104-4(j) (1995) (amended by 62 Fed. Reg. 226, 228-29 (1997)).
7. Id. at § 3.104-4(k) (amended by 62 Fed. Reg. 226, 228-29 (1997)).
8. 41 U.S.C.A. § 423(f)(1) (West Supp. 1996) (amended by National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, § 4303, 110 Stat. 186, 659-65).
9. Id. § 423(f)(2) (amended by National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, § 4303, 110 Stat. 186, 659-65).
10. Id.
11. Id. § 423(i) (amended by National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, § 4303, 110 Stat. 186, 659-65).
12. Id.
13. Id. § 423(p)(3) (amended by National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, § 4303, 110 Stat. 186, 659-65).
14. Federal Acquisition Regulation, 48 C.F.R. § 3.104-7(b) (1995) (amended by 62 Fed. Reg. 226, 230 (1997)).
15. Id.
16. Id.
17. Id. § 3.104-7(c) (amended by 62 Fed. Reg. 226, 230 (1997)).
18. Id.
19. 41 U.S.C.A. § 423(b)(3), (d) (West Supp. 1996) (amended by National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, § 4303, 110 Stat. 186, 659-65).